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American Export Controls and Extraterritoriality

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AMERICAN EXPORT CONTROLS AND EXTRATERRITORIALITY

by

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AMERICAN EXPORT CONTROLS AND EXTRATERRITORIALITY

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Part I

The American Mechanism of American Export Controls

Introduction

As the 1981 sales of propeller milling machines to the Soviet Union by Toshiba Machine Co., Ltd.\(^1\) show, diversions of strategic goods undermine the entire Western security net.

In practice, goods are rarely diverted directly to Warsaw Pact countries. Generally the goods pass through several countries before reaching the proscribed destination. The goods are initially shipped under proper license to a reliable importer in a COCOM member country. Then, often, the goods start a long trip inside the European countries until they reach a "point of vulnerability,"\(^2\) i.e., the goods will enter a country which does not have an effective system of controls or will be sold to a customer who "without any intention of participation in a diversion scheme, through ignorance, carelessness or an economically motivated lack of curiosity,"\(^3\) proceeds to transfer the goods to a buyer that is prepared to pursue deliberate measures to circumvent export controls. To reduce these "points of vulnerability," the American government has attempted to control the export of strategic goods\(^4\) and information not only from U.S. territory but also from foreign countries.\(^5\) In addition to exports from the U.S., the U.S. Export Regulations are directed to the following transactions occurring outside the United States: (1)
re-export of American origin goods and/or technology; (2) export of foreign products incorporating American parts and components; and (3) foreign origin equipment and technology exported by U.S.-owned or controlled foreign firms.

Such extraterritorial applications of American Export Controls harm international commercial activities. The U.S. trade surplus in technology plunged from $87 billion in 1981 to an estimated $500 million in 1987. International customers increasingly are buying non-American high-technology products because U.S. Export Controls are far more stringent than those of COCOM countries. Furthermore, the application of U.S. Export Controls beyond American borders has been seen by COCOM countries as an infringement of their sovereignty and has been the cause of tensions between the United States and its COCOM partners. The 1982 American embargo on United States origin technologies to the Soviet Union was seen by man European countries as an excellent example of how "not to manage an alliance." The tensions between the United States and COCOM countries were such that the French Foreign Minister Claude Cheysson viewed this extraterritorial adventurism as a cause of a "progressive divorce" between the United States and Western Europe. Some countries, among them England and France, have even tried to resist such embargo using blocking statutes or principles.

Since World War II, the extraterritorial application of U.S. antitrust law has been the basis of many clashes between the U.S. and the allies. The main basis of controversies between the U.S. and foreign countries has been the U.S. pretrial discovery procedure and the "treble damage" sanctions under U.S. law. Under U.S. law the
Department of Justice, the Federal Trade Commission, a grand jury or a federal judge may request the production of documents or information from abroad.

Failure to comply with the American requests is subject to U.S. legal sanctions. These requests have been viewed by foreign countries as an infringement of their sovereignty. Such countries as the United Kingdom, France, Canada, Australia have retaliated by the adoption of blocking statutes forbidding the communication of business information and documents to foreign authorities and forbidding or frustrating the enforcement of treble damage judgments against their domiciliaries.

This thesis examines the American extraterritorial approach to controlling the movement of strategic goods abroad on the basis of some connections with the United States, often considers the possible use of existing blocking legislation or principles in other countries to counteract the American use of the extraterritorial approach. Certain conclusions are then drawn about likely future developments.
Chapter I

United States Export Controls - Introduction

A. United States Export Control: An Historical Background

Traditionally, the United States government has restricted export only in times of war or national emergency. In 1945, the termination of war did not result in the disappearance of Export Control. With the beginning of the Cold War Period, the idea of using trade controls during peace times emerged. The Export Control Act of 1949 formalized this idea. This legislation responded to specific economic emergency situations and was initially instituted on a temporary basis, the restriction having to disappear as soon as the U.S. and Europe would have recovered from the war. The act of 1949 had three goals, the first of which was to keep certain critical items in the United States. At that time the United States economy faced serious shortages of such items, and it was recognized that unregulated exports would drain these goods from the country. The second goal was to sustain the American plan which aided the post-war recovery of the European Economy. The plan involved the channelling of particular goods to certain countries on a priority basis. In addition, there was a third goal, which at the time was subsidiary but ultimately became the main reason for the continuation of the controls, i.e., close scrutiny over shipments to the Soviet Union and other communist countries of "dual use" goods.
In the 1960's when extension and amendment of the Export Control Act of 1949 was necessary, the economic and political environment had changed. Stalin's successor had adopted a more amiable attitude toward Western Europe and the U.S. Also, in their economic policy for recovery, Western European countries decided to expand trade with Eastern Europe and the Soviet Union. This new environment influenced the 1969 Export Control Act as well as the philosophy adopted by the U.S. regarding the control of exports. The 1969 Export Control Act changed the focus of the American policy from strategic embargo to a qualified promotion of exports, while retaining the formal licensing structure. A multilateral cooperation among nations became necessary because foreign availability of non-U.S. strategic or military products made unilateral controls ineffective. Export Control also became a helpful tool for the U.S. foreign policy.

In 1950, the Coordinating Committee for Multilateral Export Controls (COCOM), an informal multilateral organization composed of Japan and all the North Atlantic Treaty Organization (NATO) countries excluding Iceland and Spain, was created. Its goal was to coordinate the Export Control Policy of the United States and its allies by means of voluntary adherence to unanimous decisions. Its main functions are to establish and then to review three lists of goods, products and technologies which are embargoed. These lists are the munitions list, the nuclear power list and the dual use list. The export to embargoed countries of goods or technologies mentioned on the list requires the authorization of COCOM. The establishment of such a committee was the first indication of the U.S. concern for foreign availability when enacting export control, and was the
beginning of a global system of export control based on international cooperation. But the system was challenged by the business community. The business community considered that export control was a necessary preventive measure for the leakage of certain sensitive goods or technology to the communist bloc. But the present Export Administration Act was seen as more harmful to the American economy than effective for the protection of its national security. It did not serve well in protecting the American national security because European countries and Japan had adopted a more flexible export control system and were already trading with the East. Therefore, there was a need for a more flexible export control system which would be suitable to heightened economic relations between the East and the West.

By enacting the Export Administration Act of 1969, Congress made attempts to establish a new balance between export promotion and national security. The Act of 1969 remained in effect for ten years. In 1977 Congress passed the Export Administration Amendments Act of 1977 which continued the 1969 Act until September 30, 1979. One of the additions made in 1977 was the expansion of its jurisdiction to "any goods and technology exported by any person subject to the jurisdiction of the United States." This was an open-door policy to extend U.S. export controls to other countries, and it resulted in international tension. The Export Administration Act of 1969 was scheduled to expire in 1979. At this time, faced with general dissatisfaction over the implementation of the 1969 Act, Congress decided in 1979 to rewrite the law entirely rather than merely to extend it with minor modification. Congress passed a new
Act which still serves as the basis for the present system of American export controls. Indeed, the 1985 Export Administration Act is only an Amendment of the 1979 Export Administration Act. Therefore, a thorough examination of the actual American export control mechanisms requires a study of both the 1979 and 1985 Export Administration Acts and the regulations issued by the Department of Commerce thereunder.

B. U.S. Export Control: the Current Mechanism

The Export Administration Act gives broad power to the President authorizing him to "prohibit or curtail the exportation of any goods or technology subject to the jurisdiction of the United States." This control is implemented for national security, foreign policy and short supply reasons through a licensing mechanism. There are principally two types of export licenses: the general license and the validated license. A general license does not resemble a true license in that a formal document is not issued. Instead it is a general authorization given to exporters, which authorizes the shipment of specified goods and technology to various destinations without the requirement of individual transaction review. The exporter must file a "shipper's export declaration" at the port of export or at the place of mailing. In addition, the exporter may be required to indicate a destination on the bill of lading, an air waybill, and a commercial invoice to prevent diversion of the goods or technology from their specified destination.

A validated license is a formal authorization issued by the Office of Export Administration upon submission of a written application. After individual scrutiny, the authorization will then
be issued for a specified good or technology during a particular time
and it will be issued for a named purchaser in a particular country
and his intended use of the item.

To determine whether or not a validated export license is
required, an exporter must first consult the schedule of "country
groups" and then refer to the Commodity Control list.

The Office of Export Enforcement (OEE) of the Department of
Commerce, together with the U.S. Customs Service, investigate, and
enforce the export regulations. The most useful document in the
enforcement of export controls is the Shipper's Export Declaration
(SED). The SED is a report that the exporter makes to the DOC. If
the information produced on the SED does not coincide with the items
printed on the bill of lading (the route, the time, the name and
location of the purchaser and the use of the goods), the statements
on the SED are false. A false statement is evidence that the
exporter may have attempted to ship the goods without having obtained
the proper license. The Export Administration Act authorizes a
variety of criminal and civil sanctions in cases of diversion or
attempted diversion in case of diversion or tentative use of
diversion. The Export Administration Act imposes sanctions only
for "knowing" or "willful violation." However, the definition
adopted by the Department of Commerce of "knowing misconduct" is so
vague that it applies to all violations, even those done by accident
as well as those due to insufficient inquiries concerning the
requirements of U.S. law. Therefore, American export control law
imposes a heavy burden and risk to foreign as well as American
companies.
Chapter II
Scope of Jurisdiction and Extraterritorial Reach of United States Export Controls

The Export Administration Act grants jurisdiction to prescribe and enforce controls on exports from the United States and on exports and re-exports from foreign countries. This jurisdictional reach is based on the authority given to the President by the Export Administration Act. The Export Administration Act of 1985, using the same formulation as the Export Administration Act of 1979, gives the President the power to prescribe and enforce controls on exports of any goods, technologies and other information "subject to the jurisdiction of the United States" or exported by "any person subject to the jurisdiction of the United States." This power is so broad that the President could, if he wanted it, "embargo buttons because they could be used to hold up Soviet soldiers' pants" or forbid United States scientists to travel abroad because they carry strategic information in their heads.

A. Goods or Technologies Subject to the Jurisdiction of the United States

1. Definition of good and technology

The term "good" as used in the act means "any article, natural or manmade substance, material, supply or manufactured product, including inspection and test equipment and excluding technical
data. And the term "technology" means the information and
know-how (whether in tangible form, such as models, prototypes
drawing, sketches, diagrams, blueprints, or manuals, or intangible
form, such as training or technical services) that can be used to
design, produce, manufacture, utilize or reconstruct goods, including
computer software and technical data, but not the goods
themselves. The Office of Export Enforcement (OEE) has construed
the term technical data so broadly as to include visual inspection of
American equipment and facilities abroad, or an exchange of
information abroad and the application to situations of personnel
knowledge or technical experience acquired in the United States.
If the administration applied the Export Administration Act
literally, the regulation of all exports of technical data would
require something approaching a state policy. Newspapers, books,
and even letters Fax sent abroad would be censored. University
classrooms would have to be monitored to ensure that foreign students
could not acquire United States origin data. Freedom of travelling
as well as freedom of speech would be endangered.

2. Definition of American goods

With the exception of airplanes, ships, and possibly
historical cultural artifacts, there are no rules of international
law governing the nationality of goods. Therefore, the United States
considers it is free to adopt a broad definition of United States
goods and apply the so-called "Theory of Contamination" to it.
According to this theory, goods have an unalterable and contagious
nationality. Therefore, United States export controls will apply to
reexport of U.S. origin goods and technology, export and reexport
of certain foreign products incorporating U.S. origin parts and components, and export and reexport of certain foreign produced goods based on U.S. origin technology. Therefore, the inclusion of a single U.S. origin component can subject a foreign manufactured end product to U.S. reexport restrictions even if the component is not the principal element of the product. Due to foreign pressure the United States has relaxed this rule in cases where the component is a relatively minor part of the product. Thus, a foreign manufactured product using United States technology or components will be exempted from U.S. reexport control if the value of the U.S. technology or component used in it does not exceed 25% of its value, for export to member countries of COCOM and countries having control agreements similar to the U.S., or if it does not exceed 10% and $10,000 in value for other countries. This relaxation of the rule is an improvement for US exporters, but the nationality of goods and technologies is still too broad a basis for jurisdiction. It gives the American law unprecedented extraterritorial application and complicates substantially the difficult area of conflict of laws.

As broad as the contamination theory is, it nevertheless cannot justify American jurisdiction over foreign companies which are not using "American goods." To bring them into the web of regulation and control, American courts broadly interpret the notion of "persons subject to the jurisdiction of the United States."

B. Persons subject to the jurisdiction of the United States

The regulations define United States person as any person who is an American resident or national. This definition includes an American corporation or citizen, a foreign individual who is a
resident of the United States, a subsidiary of an American company incorporated abroad. The last part of this definition constitutes the crux of the problem. To resolve it, one question must be answered: to what extent is American nationality attributable to a subsidiary outside the territorial boundaries of the United States? The principles governing the nationality of a corporation have been described as "unsettled" or more aptly as a "haphazard melange made of scraps of national rules stuck together." There are two principal criteria for determining a corporation's nationality: its place of incorporation, or its "siege social": place of control and management.

Generally, Common Law countries such as the United States and England attribute to a corporation the nationality of its state of incorporation. Civil Law countries such as France, Italy attribute to a corporation the nationality of its "siege social," the most important pronouncement by the International Court of Justice on the nationality of a corporation was the Barcelona Traction Case which adopted the criterion of incorporation and that of siege social. But there is still no criterion universally recognized, and U.S. courts sometimes invoke the standard of control in order to obtain jurisdiction in a particular case. This lack of consistency regarding which law to apply leads to conflicts, and neither corporate law nor international law provides an answer as to which country's law should prevail.

While the standard of incorporation is easy to delimit, that of control is difficult to define; nevertheless some guidelines can be drawn. A subsidiary of a foreign company may be considered
controlled *de facto* by its parent, when the parent has the ability or
authority to establish the subsidiary's policies as well as the day
to day operations of the subsidiary. Authority and ability to
control the subsidiary are inherently difficult to prove;
consequently, a number of presumptions and subjective judgments are
involved. Some presumptions of control have been legally established
by states or legislators. There is presumption of control, for
example, under Federal Regulations regulating restrictive trade
practice or boycotts when the U.S. parent owns or controls more than
50% of the voting securities of the foreign subsidiary, or when the
U.S. parent owns 25% or more of the foreign subsidiary's voting
securities and there is no shareholder with equal or larger share.
The incorporation test is usually applied by American courts, but
sometimes the court invoke the control test.

The Supreme Court in *Clark v. Mebersee Fonanz Korporation* in
1941 decided to "pierce the corporate veil" and to apply U.S. law
to conduct occurring abroad. Three months later the term "person
subject to the jurisdiction of the United States" was defined by the
U.S. Treasury Public Circular No. 30 as including any entity which is
controlled or owned by U.S. residents, citizens or corporations.

The Treasury Department's definition was the starting point of
all subsequent U.S. attempts to regulate foreign subsidiaries
incorporated abroad. It was also the beginning of international
tensions on this subject between the U.S. and its allies. This
extraterritorial extension of American law was challenged by the
allies on the basis that such a far-reaching application of United
States export control exceeded presidential authority and in addition was contrary to international law.

C. International law as a Limit to the Extraterritorial Application of Export Controls

1. Introduction

Are there any legal limitations to the extraterritorial application of export control? To answer this question, the position of international law regarding the extraterritorial application of export control must first be examined as well as its application to Congress.

International law recognizes that each nation/state constituting the international community possesses a sovereign and equal status abstractly, without regard to the size, or the political or economic power of that state. Although there is not a universally recognized definition of the word "sovereignty," sovereignty was defined early by Grotius and more recently by B. Jeanneau as the supreme power that resides in a state. A state's sovereignty has two components: internal sovereignty and the external sovereignty. Internal sovereignty, or territorial supremacy, provides that a state has absolute domination and control over all individuals and properties within its borders, including an unchallenged right to regulate corporations within its territory. The principle of territorial jurisdiction is a consequence of the principle of territorial supremacy. While territorial jurisdiction gives to the state the right to prescribe and enforce any rule of law within its territory, it also, on the other hand, gives to the state or the other states the duty to refrain from enacting any legislation that
infringes on the territorial supremacy of another state. If this is so, the extraterritorial application of the Export Administration Act is contrary to international law except if the act falls within the scope of the exceptions of territorial principles recognized by international law. Although five exceptions are recognized, only three are relevant to the present study: the nationality principle, the effect principle and the protective principle. These three exceptions to the territorial principle will be discussed in light of the Yamal pipeline controversy.

It will be demonstrated that none of these three principles justifies the broad reaching legislation passed by the Reagan Administration in June 1982. In this particular example these principles place limits to the exercise of jurisdiction control claimed by the United States over activities occurring outside its borders. Can these principles be universally recognized as rules limiting the extraterritorial reach of American export control regulations, and, more generally, the extraterritorial application of United States law? Certainly not. These principles are not clearly established to constitute a guideline that permits courts to decide questions of extraterritoriality in a consistent and clear fashion.

2. The Yamal Pipeline controversy

Following the imposition of martial law in Poland, on December 30th, 1981, President Reagan prohibited export from the United States of equipment for the Yamal gas pipeline using his export control power under section 6 of the Export Administration Act. Subsequently, in June 1982, the Department of Commerce extended the ban on export for the Yamal pipeline to apply to all foreign firms
owned or controlled by United States persons and to any foreign firm using American technology under a licensing agreement with a United States firm. The controls were supposed to be applied without taking into account when the affected equipment or technology was exported from the United States. Even if a United States component or item of American technology has been exported prior to the June 1982 regulation, and even if no restrictions were attached at that time to that export, any foreign firm using that component or technology was held subject to the new control measures. These measures were inconsistent with international law because of their broad extraterritorial application.

3. Extraterritoriality and International Law

The amendment of 1982 is too far reaching to be justified under any of the internationally accepted bases for jurisdiction, i.e., the nationality, the effect and the protective principles. Nor can it be justified by international practice, i.e., the existence of a submission clause in the contract.

a. The Principle of Nationality

The principle of nationality allows a sovereign nation to exercise jurisdiction over the activities of its subjects wherever they may be. The principle cannot justify jurisdiction over foreign companies which are not controlled or owned by U.S. persons, but are simply using U.S. goods or technology because, as has been discussed before, nationality is a legal concept applicable to persons but not to inanimate goods or ideas. Nor can the nationality principle justify jurisdiction over non-U.S. companies, non-U.S. goods or technology for two reasons. First, the nationality
principle is held by common international law practice to give way whenever it is in conflict with an action of jurisdiction under the territorial principle. Second, the nationality principle also is contrary to the traditional concept applied by American courts (i.e., the incorporation) and the principles recognized by international law (i.e., the incorporation or "the Seat.") In Barcelona Traction the International Court of Justice stated that only two "traditional criteria" ("criteres traditionnels") can be used to determine the nationality of a corporation: "the place of incorporation and the seat." Although this decision was made in a case involving the field of diplomatic immunity, it sets forth the general principle of international law. Therefore extraterritorial reach cannot be justified on the basis of the Nationality principle.

b. "Effect Principle"

The territoriality principle which allows a sovereign national to exercise jurisdiction over persons and things within its territorial boundaries cannot be a basis for jurisdiction because the goods had already left the United States and were no longer subject to its jurisdiction. However, with the development of communications and the economic and political interdependence of the Nation States, the courts were obliged to adapt the territoriality principle to new contingencies. Therefore they recognized the so called "effect" or "objective territorial" principle. This principle, which has been characterized as a "slippery slope which leads away from the territorial principle towards universal jurisdiction," allows a state to have jurisdiction over "any conduct outside" its borders which has consequences which the state reprehends." The
Restatement (Second) of Foreign Relations law tried to limit the scope of the "effect doctrine" requiring that the effect be "direct, foreseeable and substantial." But this attempt did not have any practical consequence. As broad is it is, the effect doctrine cannot however justify the pipeline embargo. It cannot be argued that the exportation from the European Community to the Soviet Union has "direct, foreseeable and substantial" effects on the American territory which is not only undesirable but which can be reprehended by American Law.\(^{68}\) Any effects in the United States are indirect.\(^{69}\) Direct effects are between those nations which are party to the trade, i.e., the European Community and the Soviet Union.\(^{70}\) Unlike economic effects which are generally quantifiable, or at least more easily identifiable by a market variation in market price, a threat to national security on the other hand is both intangible and speculative.\(^{71}\) Furthermore, a challenge to impartiality of American judges may be raised. Given his American perspective in frame of reference it would be difficult to a United States judge to way foreign nations sovereign interest against the enforcement of United States' law.

As Maier has argued, in practice balancing analysis often operates as a means of "asserting the primacy of U.S. interests in the guise of applying an international jurisdictional rule of reason. This observation is borne out by the fact that the balancing test almost invariably yields the same result: jurisdiction lies."\(^{72}\) By trying to weigh the incommensurable the "effect" doctrine is too political to be a suitable limit of extraterritorial jurisdiction. Ad hoc by nature, the balancing test is highly discretionary and
reflects the particular frame of reference of a judge. Therefore, this doctrine fulfills neither the principle of predictability nor the principle of comity, two needs that a generally acceptable principle of extraterritorial jurisdiction must fulfill.

c. The Protective Principle

The protective principle allows a sovereign nation to exercise jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that state. Thus it may be only in unusual situations that the extraterritorial application of the Export Administration Act will be justified under this principle.

The courts have enunciated two conditions that must be fulfilled in order that the protective principle may be used as a basis for extraterritorial jurisdiction. First, the conduct must generally be recognized as criminal by civilized nations. The exports controlled by the Act will rarely be considered criminal activity by the international community. If there were a consensus among the nations on the commitment of a crime, the only problem remaining would be a question of conflict of jurisdiction, i.e., who should regulate such crime. In export control matters, the problem is more complex, because there is a clash between different nations' policies. The government of each country involved has its own views. For instance, during the Yamal pipeline controversy the United States believed that sanctions should be imposed, while European countries considered that exports to the Soviet Union were beneficial to their economies as well as their foreign policies. Second, the effect of the transaction between a third country and a country of the east
bloc must affect the United States especially; a potential
generalized effect which may or may not affect the United States is insufficient. The main effect could never be on the United States, which is not even a direct party to the transaction.

The export controls imposed in the Soviet Pipeline case provide a clear illustration of the inapplicability of the protective principle. The controls were promulgated under section 6 of the Export Administration Act (i.e., Foreign Policy reasons) and not section 5 (i.e., National Security reasons). Therefore, the American government itself did not tried to justify its extraterritorial jurisdiction on national security grounds. On the one hand, the fact of having shipped controlled goods and technology to the Soviet Union for building the Yamal pipeline had not been considered as a criminal act by the international community. Exports to the Soviet Union were a component of the European countries' foreign policies. On the other hand, no particular effect could be demonstrated on U.S. territory. Therefore, the protective principle cannot justify export control measures in this situation. This principle will certainly never be a suitable basis to justify the transnational extension of export controls.

d. Principle of Voluntary Submission

Certain commentators have argued that the extraterritorial reach of U.S. export controls can be justified on the basis of a "submission clause" included in the contract between American sellers and European buyers of U.S. goods or technology. By such a clause the buyer agreed to comply with American regulations whenever exporting or reexporting U.S. origin goods or technology. The
validity of the clauses is not clear: can a private agreement between two private companies render a nation state's law enforceable abroad?

According to international practice and general American practice, private agreements cannot expand the authority of one nation to govern conduct within the territory of another. Such use of freedom of contract is contrary to American law as well as to international law. A study of the American position concerning the application of the antiboycott provisions of the Export Administration Act\(^7\) and the Calvo clause\(^8\) demonstrates that U.S. courts do not recognize private agreements which have for purpose the contravening of U.S. public order. In addition, the United Nations Resolution 2625 (XXV) in its Article 2 states that: "all people have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development."\(^8\) This is a clear affirmation that the public order of a nation state is a matter for the people of that state alone to decide and not something that can be imposed from the outside. Therefore, international law does not allow private agreement to expand the authority of one nation to impose its will concerning conduct on the territory of another nation.

The export controls imposed in the Soviet pipeline case provide a clear illustration of the inapplicablity of the principle of voluntary submissions as a basis for extraterritorial jurisdiction. After June 22nd 1982, the controls were supposed to be applied without considering the time the relevant equipment or technology have been exported from the United States. Reexport controls could
have been imposed on goods and technology even if at the time they had left the United States, they were not subject to export restrictions. How in such cases can voluntary submission be sustained? But even in the case where goods and technology were subject to export restrictions at the time they left the United States, the "voluntary submission" doctrine is not a suitable basis for extraterritorial jurisdiction. The public policy of the European Community and its members states cannot be displaced by U.S. policy, because this constitutes an unacceptable interference in the internal affairs of the European Community.

e. Congress is not Bound by International Law

Extraterritorial application of export control cannot find any basis under international law. As has been shown above, the president, in June 1982, acted contrary to international law by imposing control on foreign subsidiaries. However, this does not mean that presidential measures were illegal and therefore void. The application of international law varies from one country to another and the American Congress is not bound by international law. Under American law constitutionally valid statutes enacted by Congress prevail over international law if Congress expresses "clearly and affirmatively its intent to act contrary to international law." Thus the legality and validity of export controls applied extraterritorially will depend upon Congressional will. In order to discover Congressional intentions, an analysis of the legislative history of the Export Administration Acts of 1979 and 1985 is necessary.
Chapter III
Consequences of the Extraterritorial Reach
of American Export Controls

A. Economic Cost of the Extraterritorial Application of
American Export Control Mechanism

As the pipeline case demonstrates "extraterritorial application of U.S. export controls could do significant commercial and economic damage to America's allies abroad. It also has an adverse 'boomerang' effect on American economic interests."90 The extraterritorial application of American export controls has a negative effect on existing contracts as well as future business.

1. Effect on Future Contracts and Markets

The extraterritorial jurisdiction of U.S. export controls is the main reason for the loss of many potential contracts by American firms.91 Due to the permanent threat of not being able to perform its engagements because a U.S. technology or component has been used in a totally foreign manufactured product, Western Europe has tried to reduce its dependency on U.S. technology and components92 by either looking for more reliable suppliers such as Japan or by developing their own technologies.93 Due to the favorable climate of technological cooperation that exists in Europe, it has been able to develop its own technologies and goods and therefore avoid being
subject to U.S. controls. Such a move away from the U.S. could be extremely damaging to America's position as leader at the high technology field and could jeopardize Western collaboration in high technology projects.

The extraterritorial extent of U.S. export controls also caused the loss of important export markets. Generally the east bloc countries will not deal with a company subject to U.S. export control if a substitutable product or technology is available from another source. The decrease of sales to the east bloc causes the loss of many jobs. A recent study found that 135,000 jobs in 1979 and 85,000 jobs in 1982 in the U.S. were connected with the sale of technology to the Soviet Union. In Europe, a million jobs depend on trade with the east. Furthermore, entering a new export market is an expensive and long process. Due to the concerns over possible future controls, firms which are subject to the jurisdiction of the U.S. do not enter markets in Eastern Europe. Therefore, export controls indirectly are one of the reasons for the American trade deficit. Due to the extraterritorial jurisdiction of U.S. export controls American investments are not any more welcomed abroad. Foreign governments such as England "which have traditionally welcomed U.S. investment have felt differently because those investments have been continually affected by American foreign policy concerns" which are not always shared fully by the host government.

Extraterritorial application of American export control is also one of the reasons why host governments are reluctant to accord non-discriminatory or national treatment to U.S. investments. Extraterritorial application of U.S. Export Controls is a major reason for the loss of future contracts and potential export markets.
by firms subject to the jurisdiction of the United States. In addition, Export Control can be the reason for a breach of existing contracts.  

2. Effect on Existing Contracts

Many European leading industries are dependent on U.S. technology. Therefore U.S. embargoes have been the reason on one hand of the breach of many contracts and on the other hand has caused delays in the execution of such contacts.

a. Breach of Contract

If the President imposed new foreign policy controls under the Export Administration Act of 1979 these controls would void all contracts --even contracts of American subsidiaries abroad or foreign affiliates using American technology or components and a third country.

The Export Administration Act of 1985 tries to remedy this problem by limiting the presidential authority to terminate contracts which "persons subject to the jurisdiction of the United States" have entered into for the export or reexport of goods. The President may break such contracts only where a "breach of peace" threatens the strategic interests of the United States and after consultations with Congress. Furthermore, the "export control will continue only so long as the direct threat persists." However, the phrase "a breach of peace which poses a serious and direct threat to the strategic interest of the United States" is vague. Therefore the President can still justify under the 1985 Act almost any breach of contract. The use of the "effect doctrine" to justify jurisdiction over acts committed abroad demonstrates the breadth of the American
perception of acts committed outside the American territory that affect U.S. territory. One of the conditions required to justify extraterritorial jurisdiction under the effect doctrine is the existence of a direct effect. Nevertheless jurisdiction in many international cases in the antitrust field was justified under the "effect" doctrine, even though the effect on U.S. territory was indirect. A "threat to the strategic interest of the United States" is always relative and subjective. In its conception of East-West relations the United States adopted a "theological approach", under which many actions taken by the Soviet Union for expanding communism will be regarded as "breaking the peace" established by the "free world" countries and therefore considered as a "direct threat to the strategic interest of the United States" by the President as well as by Congress.

This new sanctity of contract provision would certainly not have stopped Presidential action in June 1982. Ostensibly, foreign policy considerations relating to Poland motivated the June 1982 measures; it was widely believed then, however, and it is still so thought, that the controls were in fact a last effort, independent of the Polish situation, to slow or frustrate the construction of the Siberian gas pipeline. Obviously, the Reagan administration appeared to fear that Western European dependence on gas purchases from the Soviet Union constituted a breakdown in the alliance that would "pose a serious and direct threat to the strategic interest of the United States." And Germany is now paying for gas at a rate above 33% of the current market. This sanctity of contract clause will not have immediate effects. In the long run, this new clause may
improve the reliability of American companies, but this improvement will depend on interpretation by courts of the new clause as well as a more predictable and less ethnoantric foreign policy adopted by the U.S.

b. Delay

The principle involved is that to export is not a right but a privilege. For each transaction a license still must be obtained. In contracts involving "dual use" technology or goods there is always a risk that the license may be denied. Furthermore, the procedure for processing export licensing applications is a time-consuming one. The delay in obtaining a license is the reason for many lost transactions. As a practical matter a buyer generally must meet deadlines and cannot take the risk of termination business relationship because an export license is denied. Therefore if similar products are available, foreign purchasers will be willing to pay a premium price to obtain an immediate delivery. Time is an economic good that must be included in the total purchase. Gregory's study has shown that a 5% increase in waiting time is equivalent to an 8% increase in the actual price. Any licensing mechanism imposed on "firms subject to the jurisdiction of the U.S." implies a loss in the efficient use of their real resources and places such firms at a competitive disadvantage. The Act of 1985 has attempted to address this problem of lost transactions by reducing the time processing for obtaining a license by establishing a new licensing procedure. The new act seeks to reduce by one third the maximum processing time required to process a license under the Export Administration Act of 1979.
In the past the use of political export controls on several occasions has created a "control psychology" among foreign nations. Therefore the Export Administration Act will, only on a long term basis, reestablish the reputation of firms subject to the jurisdiction of the United States as reliable supplier. As it has been argued, the Export Administration Act of 1985 maintains control over exports for foreign policy reasons and only establishes a weak contract sanctity clause while not firmly forbidding extraterritorial jurisdiction of U.S. controls. In September 1989 Congress will have the choice to abrogate or to reissue the Export Administration Act of 1985. It is likely that the Export Administration Act of 1985 will be extended. However, if the foreign policy section is kept in 1989, it will be desirable that a stronger contract sanctity provision be adopted and that extraterritorial application of U.S. export controls be expressively forbidden and such without any exception. U.S. export controls have been used extraterritorially only as a tool to overrun foreign policies adopted by other nations and therefore has not only caused economic cost but also political cost.

B. The Political Cost of the Extraterritorial Application of American Export Control Mechanism

For too long the United States has taken for granted that Western Europe is pro-American and decidedly anti-Soviet. Most of the European Countries are anti-Communist, but anti-Communist does not mean anti-Soviet. For historical reasons, sheer geographical contiguity and tradition of complementary trading patterns, the leaderships of Western Europe have considered trade and
exchange relations with the East as mutually beneficial.\textsuperscript{130}

Therefore, any extraterritorial application of American export control policy frustrates allies trade policy, provokes violent allies' reactions and weakens the Alliance.\textsuperscript{131} Such political tensions can be resolved by strengthening the mechanism of the COCOM.

COCOM\textsuperscript{132} is the "heart of the implementation of any Western strategic trade policy."\textsuperscript{133} The Committee is a vital organ for the survival of a strong and unified alliance. But the Committee is an informal government-to-government mechanism without any strict legal basis or constraining structure which can force its members to implement its decisions. This unofficial status makes the COCOM forum particularly vulnerable to internal strains occasioned by differing policy perceptions and interests among its members.

Consequently, any violent disagreement concerning East-West trade between the European allies and the United States threatens COCOM's viability and Western security.\textsuperscript{134}

Unilateral imposition of export controls on overseas companies raises questions about the value of an alliance. An alliance must reflect a plurality of interests and must be based on prior consultation. The Yamal pipeline controversy is a good example of the political cost of the imposition of American Export Controls outside American boundaries. Jonathan Stern sees the American action as a "classic example of how not to manage an alliance,"\textsuperscript{135} especially in an Europe of Nation States, in which the Gaullism is still triumphant. In a sense in June 1982, for a very brief period of time, Western Europe and the Soviet Union were united in sentiment and interest against the United States.\textsuperscript{136} Claude Cheysson saw the
beginning of a "progressive divorce"\textsuperscript{137} between the United States and Western Europe. The tension was not serious enough to suggest a divorce. However the infringement by the United States of the sovereignty of European nations, who are sometimes supersensitive regarding their prerogatives has produced intense reactions and a temporary crisis on the alliance. To avoid such a crisis in the future,\textsuperscript{138} the problem of the extraterritorial application of United States Export Controls must be solved by addressing its political cause. Only a control alliance strategy on East-West trade\textsuperscript{139} can stop the present ping-pong game: the United States applying its export control legislation followed by the allies enacting blocking legislation. However, even if such a compromise\textsuperscript{140} is reached, the allies will still need to demonstrate an obvious goodwill to implement such compromise through their national legislations.\textsuperscript{141} These political preconditions\textsuperscript{142} must be met before the United States can tackle the legal issue of extraterritoriality satisfactorily.
Part II
Reaction Abroad to the Extraterritorial Application of the Export Controls

Chapter I
General Overview

A. Reasons for Adoption of Foreign Blocking Legislation.

Since World War II the volume of international transactions has grown tremendously and has helped in the development of many multinational corporations. Corporations make decisions on the basis of their global operations rather than solely on those operations located in their home country. As a result, certain countries, such as the United States, which is often the country in which the headquarters of many of these multinational corporations are located, believe that their sovereign control over these corporations is jeopardized by the international basis for policy-making of these multinationals and have extended their national policies outside their boundaries to gain jurisdiction over the entire range of economic activities of the multinational corporations. Such extraterritorial application of American law has been viewed by the countries in which subsidiaries and customers are located as an infringement of their own economic, political and jurisdictional sovereignty and has resulted in the enactment of blocking legislation by foreign authorities.¹⁴³
1. **Safeguarding Economic Sovereignty.**

Each nation, no matter its size or the percentage of foreign investment in there, is free to establish its own economic policy without any "advice" from foreign authorities. Therefore, extraterritorial application of American law is viewed by foreign nations as an infringement of their sovereign power to control economic development, investment, trade, and commerce within their own territories. 144

2. **Safeguarding Political Sovereignty.**

Each nation has its own national interest, which takes into consideration the customs, history, geography, and economic situation of that country. Thus, even if a nation is an ally of the United States, its political system and the policies enacted by its political institutions are usually quite different from the system and policies of the United States. Being allies does not (and should not) entail losing individuality. In any alliance there is a consensus on certain subjects (i.e., the "hard core", "hard nucleus") and dissent in certain subjects. Dissent is necessary to maintain national identity and to improve the alliance by forcing consideration of difficult and new ideas or approaches to problems. Therefore any attempt by the United States to foreclose political dissent by applying its law extraterritorially may be viewed as an infringement of the political sovereignty of foreign nations. 145

3. **Safeguarding Jurisdictional Sovereignty.**

Common Law countries and Civil Law countries have a different approach to trials. 146 Chiefly among these differences is the scope of allowable discovery. The discovery permissible under American law
is viewed by European countries, including England (a Common Law 
country), as an abnormal, intrusive procedure especially when used 
outside United States boundaries. European Civil Law systems generally discourage most extraterritorial discovery. Furthermore, 
the fact that the United States (under American law) can request 
information, documents or evidence which are not necessarily relevant 
to the case in question or about a company which is not a defendant in the trial is viewed by foreign countries as an infringement of 
their jurisdictional sovereignty (the right of a country’s courts and 
laws to determine legal issues involving its citizens).

These infringements by American law of foreign countries’ sovereignty have provoked a number of reactions, including legislative measures (foreign-blocking laws).

B. Example of two countries having adopted specific blocking 
legislation: Canada & Australia.

1. First Blocking Legislation were Specifically Directed 
Against U.S. Antitrust Law.

a. Overview of the Extraterritorial Application of 
American Antitrust Law.

The most notable extraterritorial application of one’s nation substantive law is that of American Antitrust law. To reach its goal, Congress has developed a network of statutes. Among these, the basic provisions of American antitrust policy are sections 1 and 2 of the Sherman Act. Section 1 proscribes "every contract...in restraint of trade." Section 2 condemns single firms gaining an excessive degree of economic power and thus becoming free from the constraints of competition in setting prices and others policies.
Due to the vagueness and broadness of the above-mentioned sections, the American courts have assumed responsibility in developing American antitrust policy. In 1945, the Alcoa case enunciated the "effect" test; fifty years later, the Timberlane case enunciated a balancing test for determining anti-trust violations under American law. However neither of these two tests provides for consideration of other, i.e., non-American national interests, in the commercial activity prohibited. This omission is particularly important because due to the interdependent nature of the world's national economies, virtually all commercial activities have an effect on U.S. foreign commerce. Because of this, foreign governments have felt a need to protect their national interests/sovereignty from the extraterritorial application of U.S. anti-trust laws and have reacted accordingly.

For example, in the 1970's, the Canadian and Australian governments enacted blocking legislation specifically aimed at U.S. anti-trust law.

b. Australian Reaction to the Extraterritorial Application of American Antitrust Law.

The Australian economy, which depends primarily on the export of raw materials, especially uranium, is very concentrated, and the Australian government subsidizes its natural resources and shipping industries. Therefore, the enforcement of U.S. antitrust laws is a jurisdictional threat to Australian exports and the Australian economy in general. In response to American attempts to obtain sensitive documents held by Australian uranium producers through letters rogatory, the Australian Parliament enacted the Foreign
Furthermore, as the Australian Parliament realized in June 1982 the extraterritorial application of U.S. law nor for the enactment of Such legislation, American courts persisted in trying to secure both documents and testimony pursuant to uranium anti-trust litigation. Fearing a succession of damaging default judgments against key uranium producers, the Australian Parliament enacted the Foreign Antitrust Judgements (Restriction of Enforcement) Act of 1979. In June, 1981, a bill was presented to amend the 1979 act. The purpose of the bill was to give the "utmost protection to Australian law and policies." However due to negotiations between the U.S. and Australian governments, the 1981 bill was not enacted. In its place, the "Landmark Agreement" on the extraterritorial reach of United States antitrust laws and judgments was signed by the U.S. and Australian governments. The goal of the agreement was to promote ongoing consultation between the two governments. Such intergovernmental consultation should lead to the establishment of a common antitrust policy, there will be no need either for an extraterritorial application of U.S. law nor for the enactment of blocking legislation.

As most consultative process, this agreement was only a partial success. Certainly as it has been concluded, the Australian agreement accentuates Australian concerns over national sovereignty, caused by the United States extraterritorial antitrust enforcement. However this agreement is not "a panacea which completely eradicates antitrust strife between the United States and Australia." Furthermore, as the Australian Parliament realized in June 1982 the
problem of the extraterritorial application of U.S. law is not limited to the field of antitrust.167

C. Canadian Reaction to the Extraterritorial Application of American Antitrust Law.

Due to geographical, social, economic and political conditions, relations between the United States and Canada have always been unique. "As a result of this intimacy, Canada has been the first to feel the impact of its neighbor's antitrust enforcement measures."168

In the 1950's, due to an increase of American investment in Canada, the Canadian government became more and more aware of the need to enact legislation which can block the extraterritorial application of U.S. antitrust law.

The United States authorities at that time requested documents from pulp and paper companies located in Ontario (Canada) but owned by Americans. These requests were seen as an infringement of Canadian sovereignty and the Ontario government (as the Quebec Government) passed legislation prohibiting forced removal of corporate records. The courts in almost all cases recognize such laws to excuse a party to a lawsuit from producing documents if the party has made a good faith effort to obtain permission. These laws were short term solutions caused by the stalemate of the negotiations between the Canadian and American Government concerning the application of American law in Canada. These blocking laws did not eliminate the problem of "Extraterritoriality in Canadian-United States Relations."169 Therefore, there was a need for a mechanism which could resolve (or at least reduce) this problem through negotiation between the two governments. Following the Alcoa170
controversy, the Canadian Radio Patent litigation \(^{171}\) heightened the tension over the application of American Antitrust law in Canada and resulted in the adoption of the Fulton Rogers understanding \(^{172}\) agreement. This agreement instituted mechanisms for consultation between the U.S. and Canada when antitrust issues of common concern arose. As in the case of other consultative undertakings, this agreement was of limited success. The specific problems encountered in the uranium antitrust litigation were not resolved by the Agreement. The Canadian Parliament in 1980 introduced a bill \(^{173}\) the content of which was similar to the Protection of Trading Interest Act. This bill's main goal was to block the extraterritorial application of U.S. antitrust law and to provide a "clawback procedure" to the Canadian defendant who have been condemned by U.S. courts. This bill died in the legislative in November of 1983. But between the proposition of the 1980 bill and its abandonment, the Canadian Parliament realized that the problem of the extraterritorial application of U.S. law was not limited to the field of antitrust law but was a more global issue.

2. Legislation Enacted to block any extraterritorial application of American Law.

   a. Overview of the Extraterritorial application of American Law.

   The United States not only applies its antitrust law extraterritorially but also its labor \(^{174}\) and tax law \(^{175}\). Furthermore, the United States discovery and pre-discovery procedure has often been the cause of disputes between the United States and foreign countries, such as Canada and Australia. However the most
controversial application of American law extraterritorially is in
the field of export controls.

In the past the Fruehauf controversy caused many reactions
from foreign governments. But the Yamal Pipeline controversy has
been the "straw which broke the camel's back" urging the Australian
Parliament to enact blocking legislation. The Australian Foreign
Proceeding (Excess of Jurisdiction) Act like the Canadian Foreign
Extraterritorial Measure Act, was enacted in 1981. Both are the
culmination of an often-expressed frustration which Australia and
Canada have experienced through the extraterritorial application of
American law.

b. Australian Legislation.

While the two previous acts tried to block discovery requests
and antitrust judgments issued by foreign courts against Australian
defendants, the Foreign Proceeding (Excess of Jurisdiction) Act,
enacted on March 21, 1984, has a broader scope and theoretically
can block any type of extraterritorial issue. Especially the 1986
act provides an effective shield to any "natural person who is an
Australian citizen or a resident of Australia or to any corporation
that is incorporated or carries on business in Australia" for
avoiding compliance with any request or order from the American
administration in the area of export or reexport controls.

Inspired by the English Protection of Trading Interest Act
(PTIA), the 1986 Act gives to the Australian attorney-general the
authority to prohibit the communication of certain evidence,
information, documents in foreign courts or to foreign authorities.
The Attorney General exercises this authority if he considers that
such communication might be contrary to international law or the international practice or might be inconsistent with the Comity principle. Due to the vagueness of the requirements imposed by the section I, any action taken by the U.S. administration under the Export Administration Act can be blocked.

The term national interest has been defined broadly as including the economic interests of the country. Therefore, it can be argued that any decision or action taken by a Foreign Government is likely to affect the Australian national Interest. Section 2 affords a basis for any corporation incorporated or carrying on business in Australia to avoid compliance with an embargo imposed by a foreign authority. Section 2 affords a basis for any corporation incorporated or carrying on business in Australia to avoid compliance with an embargo imposed by a foreign authority.

The statute also empowers the Attorney General to declare certain foreign judgments unenforceable in Australia. The goal of this provision was to block the enforcement in Australia of antitrust judgments passed in the United States against Australian defendants. However, this provision was not expressly limited to antitrust litigation, and could be used to declare unenforceable in Australia certain foreign judgments in case of supposed violation of American export controls.

c. Canadian Legislation

While the Quebec and Ontario legislation blocked the removal of documents from their respective provinces in connection with foreign investigations the Foreign Extraterritorial measure Act, enacted on February 1984, can theoretically block any type of
extraterritorial issues. The provisions of the Australian Foreign Proceeding Act, are in many aspects comparable to the provisions of the Canadian Act mentioned above.

The Attorney-General may prohibit the execution of any order to produce evidence, information, document in foreign court if in its opinion "such action adversely affects or is likely to adversely affect significant Canadian interests in relation to international trade or commerce involving a business carried on in whole or in part in Canada or that otherwise has infringed or is likely to infringe on Canadian sovereignty" (Section I of the Act). Due to the broad definition of the requirement imposed any request or order from a foreign court can be blocked. However, only a request from a foreign court can be blocked. Requests from foreign authorities can only be blocked under the following provision.

The Attorney-General, with the concurrence of the Secretary of State for External Affairs, when he considers that significant Canadian interests in relation to international trade or commerce are affected or Canadian sovereignty threatened, may prohibit Canadian persons to comply with or carry out foreign governmental or court orders or foreign policy directives in Canada (Section II of the Act). Therefore, this provision may be used by "any person in Canada" as a legal excuse for avoiding compliance with an embargo ordered by the American administration.

Any antitrust decision rendered by a foreign court may be declared unforceable in Canada, if the Attorney General considers that such judgment is not enforceable in Canada. This provision has been enacted for blocking the extraterritorial application of
American antitrust law. Although there is no concrete application of this provision in any case concerning export control matters, this section could be useful for blocking the enforceability in Canada of an export control decision.

In the Canadian foreign extraterritorial measure act, as in the United Kingdom and Australian blocking legislation, a recovery of damages clause has been drafted. This provision is especially a reaction to the extraterritorial application of U.S. antitrust law.
Chapter II

A Study of The Reactions of Two Countries to the Extraterritorial Application of American Law

A. England


The first blocking legislation adopted by the United Kingdom protected only the British shipping industry from foreign interference. Several serious conflicts which later arose between British companies and the American courts demonstrated that the scope of the Shipping contracts and Commercial Documents Act (SCCDA) was too narrow and there was a need for legislation which could protect a broad range of activities against the extraterritorial application of foreign laws.

a. Precedent in the Field of Transport.

The first attempt by England to limit the extraterritorial application of American law was in the field of transport. Britain and the United States have two different approaches regarding the shipping industry. In Great Britain cartels of shipowners (known as conferences) for more than a century have been exempt from the application of United Kingdom antitrust laws. The British government has encouraged cartels of shipowners. These alliances being seen by the British government as "necessary if stable regular and official scheduled shipping services are to be maintained." In the United
States liner conferences are subject to the antitrust laws. In 1964, the Federal Maritime Commission of the United States ordered an investigation of United Kingdom conferences to determine if they were restraining trade in the United States. To be able to complete the investigation, the Commission requested the production of documentary evidence which was in the possession of certain British shipping companies. This extraterritorial request for information was seen by the United Kingdom as an infringement of its sovereignty, urging the British parliament to pass the Shipping Contract and Commercial Document Act. This act, created for a particular purpose, was only able to protect the British Shipping industry. However, all of British industry felt a need for a law which could have the effect of acting as "a sword as well as a shield."

b. Reasons for the Adoption of the Protection of Trading Interest Act.

The In Re Uranium Antitrust litigation was the case which turned "frustration to anger" and brought about the adoption by the British parliament of the Protection of Trading Interest Act. This act was intended to go further than the Shipping Contract and Commercial Document Act (SCCDA) by blocking all foreign regulations "which threaten British trading interests" rather than merely those foreign regulations which infringe upon British shipping activities or interfere with commercial documents based in Britain. This act is the most sweeping blocking legislation ever enacted. Its main purpose had been to block the extraterritorial application of American antitrust law. However, this law has a broad application and can block any attempt by the American administration to apply its export control policy to British companies.
2. **Broad Application of the Protection of Trading Interest Act.**

The act gives the United Kingdom Secretary of State a broad and discretionary power allowing him to block an order of compliance with an embargo or the request for documents and information in the hands of foreign authorities.

a. **Blocking the order of compliance with an embargo: Section I of the Protection of Trading Interest Act.**

Section I gives the British Secretary of State a broad and discretionary power, subject only to parliamentary review. The Secretary of State has full power to determine whether "overseas measures damage or threaten to damage the trading interests of the United Kingdom." The criterion of the 1980 blocking legislation, different from the 1956 legislation, giving more power to the Secretary of State. The reference to measures that infringe the jurisdiction of the United Kingdom, contested in the Shipping Contract and Commercial Document Act, has been abandoned and replaced by measures which damage or threaten to damage the trading interest of the United Kingdom. Therefore, any technical infringement on British jurisdiction that does not prejudice British trading interests is to be disregarded. The only requirement of Section I is that the measure damage or be likely to damage the trading interests of the United Kingdom. No further infringement of British jurisdiction is necessary. There is a shift towards the analysis of the problem in terms of competing sovereignty, rather than competing jurisdiction.

The requirements stated in Section I do not limit the Secretary of State's power. The only real limit to his power is established by
international law, i.e., the principle of comity. Section I, which has been used during the Yamal controversy, is an efficient tool that British companies can use to avoid compliance with an embargo imposed by the United States. However, the efficiency of this tool will depend on the way U.S. courts receive this "excuse legal."\(^{194}\)

b. **Blocking the request for documents and information: Section II of the Protection of Trading Interest Act.**

The Export Administration Act empowers the Office of Export Enforcement with a broad investigatory authority. "This authority includes the keeping of records, the inspection of books, records, premises or property, the issuance of interrogatories and subpoenas requiring persons to testify or to produce records, and the taking of sworn testimony."\(^{195}\) These prerogatives are not limited to United States boundaries. The Office of Export Enforcement can exercise its tremendously broad investigatory power overseas, as well as in the United States. Foreign individuals or entities refusing to comply with such requests for documents and information from United States administrative agencies may have their U.S. export privileges denied.\(^{196}\) Such extraterritorial applications of the Export Administration Act have been viewed by English authorities as an unacceptable extension of United States extraterritorial jurisdiction, providing impetus for the enactment of legislation which can block the request of documents and information.

Section II has been mainly drafted to block the "long arm" of American antitrust law and American procedures.\(^{197}\) However, this act is also an efficient tool for blocking the request of information and documents abroad under the Export Administration Act. Section II
gives the British Secretary of State authority to forbid compliance with "requirements" of overseas courts and authorities, with regard to commercial documents and information, which are not in their territorial jurisdiction, when the secretary decides that such compliance would or could infringe upon British jurisdiction or prejudice the sovereignty and national interests of the United Kingdom.

Section II is not a new piece of legislation. The shipping act already authorized government officials to prohibit compliance with a request for documents or for "commercial information to be compiled from documents" when such a request would constitute an infringement of British jurisdiction. However, the discovery provision of the Protection of Trading Interest Act broadens and strengthens the powers of the Secretary of State, authorizing him to prohibit compliance with a broader range of requests for some highly discretionary reasons. An infringement of British jurisdiction is no longer required. Any communication that would or could infringe the sovereignty or the national interests of the United Kingdom can be prohibited. The word 'sovereignty' is interpreted broadly to mean economic and political sovereignty. Almost any request for documents or information by administrative agencies can be blocked by Section II of the Protection of Trading Interest Act.
B. France


   Like England, France’s first attempt to limit the extraterritorial application of American law was in the field of transport. England and France have a similar transport policy. In such countries, in contrast with American law, antitrust law does not apply to the shipping industry. In 1968, the U.S. Federal Trade Commission ordered an investigation suspecting that France "Conferences" were restraining trade in the U.S. During the investigation the Federal Maritime Commission requested the production of documents concerning certain French shipping companies. To avoid the prospect of compliance of the French companies with the U.S. order, the French Parliament enacted on July 26th, 1968 a law prohibiting the communication of certain information to foreign public authorities. This law had a narrow scope. In 1979, the U.S. Federal Trade Commission ordered an investigation in the field of aviation. Due to its narrow scope, the law did not block the U.S. request. Therefore the French parliament decided to extend the 1968 law to cover the aviation field. During the consideration of the proposed bill, the Senate understood that due to the more frequent extraterritorial application of American antitrust law, the law of 1968 needed to be amended to cover not only orders concerning the field of transportation but also orders given by a foreign authority or court to a French company to produce information on
economic, commercial and technical matters. On July 16th 1980, the French law "relative a la communication de documents et de renseignements d'ordre economique, commercial ou technique a des personnes physiques ou morale etrangeres" (law concerning the communication to foreign entities or individuals of documents and information relating to economic, commercial or technical matters) entered was enacted.

The French law is based on the same reasons as the British law but is less far-reaching.

b. Efficient Shield Affects to the Business Community: Broad Application of the Law.

(i) Persons covered by the law.

Contrary to English law which is very precise, French law is general. According to Article I the following persons are covered by the Act of 1980 "...any individuals of French nationality or who usually reside on French territory and...any officer, representative, agent or employee of an entity having a head office or establishment in France..." and according to Article I, bis, "...any person...."

Read literally, Article I would prohibit an American parent having a branch or a subsidiary in France from complying with a request for information from a U.S. authority if such communication harms or is likely to harm French national interest. Read literally, Article I, bis, should apply to all persons. Does not matter whether or not the persons have a link or a connection with France. Such a literal reading of the law is contrary to its spirit. Enacted to block excessive extraterritorial application of American law, the French law of July 1980 must be interpreted in conformity with the comity
principle. The law only prohibits the communication of documents and information to non-French authorities by: French nationals, French residents, representatives, agents, employees of a French parent or a representative, agent or employees of a subsidiary or branch of a foreign company located in France.

(ii) Actions covered by the law.

The French law of July 1980 was enacted mainly to block the extraterritorial application of American law in the field of antitrust and to avoid the "fishing expeditions" linked to the U. S. discovery procedure. However, due to its extremely broad scope, this blocking legislation can be used for blocking the extraterritorial application of the Export Administration Act. Article I, bis, does not just prohibit the communication "by any means" of documents and information relating to economic, commercial, industrial, financial or technical matters." It also prohibits the request and investigation of such information and documents in France if it could "lead to the establishment of proof with a view to a foreign administrative or judicial proceeding or as a part of such proceedings." The Article I, bis, prohibition is based on the function rather than the effect of the act in question. The establishment of a harm to France's sovereignty, economic interest or public policy is not necessary. Therefore, the law of July 1980 protects French companies from the request for information by administrative agencies. Therefore the law of July 1980 could be used by French companies to avoid complying with a request for documents and information from the American Department of Commerce or Customs. However cooperation with the U.S. authorities is advisable.
The U.S. Office of Export Enforcement has many direct and indirect ways to sanction non-cooperation, by enforcing sanctions on the U.S. parent or listing the foreign entities refusing cooperation on the TDO if violations of U.S. law can be established. In practice, US company cannot be a successful exporter if the Department of Commerce restricts its export privileges in a significant way. Therefore refusal of cooperation with the US authorities could mean for the overseas entity loss of the US company as a supplier. However, there are some limits to the shield offered by the law of July 16th, 1980, to the French business community.

c. Limits to the Shield Offered by French Law.

The French blocking law must comply with the requirements imposed by treaties and international agreements and Article I and I, bis, apply only if certain conditions are met.

The law must comply with treaties and international agreements contracted by France. The reference to international agreements is intended to require exclusive use of the Hague Convention procedures, and to forbid pre-trial discovery in France based solely on American legal procedures. American legal procedures for pre-trial discovery are totally contrary to the French procedural system. France is a civil law country with a system of judicial sovereignty. Courts do not supervise private parties' actions in the gathering of evidence, but take on themselves the primary role in obtaining and preserving evidence. While US legal system allows American counsel, researching of documents in France, to require the production of evidences not only from the parties to the litigation,
but also from any person who may be witness in the suit. French
authorities see such procedure as an infringement of their judicial
sovereignty.

There are specific limits to the application of Article I. The
prohibitions stated in Article I are subject to two conditions. On
the one hand the communication must be to foreign public authorities.
But the legislative history shows that the term "public authorities"
was intended to have a broad meaning. Therefore the prohibition
enunciated by Article I applies to administrative agencies, courts,
governmental bodies or fora. On the other hand, the prohibitions
stated in Article I are based on the effect of the communication.
The only communications prohibited are those which are capable or
likely of producing harm—"de nature a porter atteinte"—to the
sovereignty, security or essential economic interests of France or
its public policy. The term "sovereignty," based on the British
Protection of Trading Interest Act, refers to the concepts of
economic as well as judicial sovereignty. The concepts of
"security," "essential economic interests," "public policy" are "des
notions fixes a contenu variable"—words having a changing and
constantly evolving meaning. Furthermore, the law does not specify
whether some meaningful harm is required. What is 'harm'? Does the
time and funds consumed during the search of the documents and
information requested satisfy the definition of harm? The conditions
necessary to the application of Article I should be easily met.
Therefore Article I can be used by French business to avoid
compliance with the Export Administration Act. However, Article I
forbids only the communication of information and documents while
Article I bis prohibits communication and even request and investigations concerning documents or information.

As Article I, Article I bis has its own requirements. The prohibition stated in Article I bis are subject to two requirements. On the one hand, Article I bis prohibitions are subject to "... the law(s) and regulation(s) in force..." i.e., the French Code of Civil Procedure (which defines the request permitted in France under the Hague Convention). On the other hand, the prohibition applies only to action leading to "the establishment of proof with a view to foreign administrative or judicial proceeding or as part of such proceedings."

The Hague Convention applies only to judicial action in Civil or Commercial matters. Therefore, the request of documents and information from an administrative agency cannot be accomplished through the procedure established by the Hague Convention. Therefore any request of documents by US Customs or US Department of Commerce (DOC), if such solicitation is likely to harm French sovereignty security, essential economic interest or public policy, can be backed by the French law of 1980.

2. Blocking forced compliance with embargoes.

Extraterritorial application of American export controls is facilitated by French corporate law. French corporate law gives absolute management control to the shareholders. This particularity of French corporate law has been used by American parent corporations to require compliance by their foreign subsidiaries with embargoes imposed by the American government. The Fruehauf case is an illustration of such indirect extraterritorial application of
American law. This case involved the Trading with the Enemy Act. However, the thought-process followed by the French court in Fruehauf could be extended to an action taken under the Export Administration Act.

a. The Concept of Abuse of Right. 217

In the Fruehauf case, the court argued that corporate interest must be disassociated from the interest of the shareholders. Under French law, a corporation is considered to have duties218 to its State of incorporation and to the French society. Personal interest must give way to corporate interest and shareholders of a company have a duty to exercise their corporate power within the confines of the affectio societatis.219 Therefore, the decision of the shareholders of Fruehauf France to comply with the American embargo against China was motivated only by the desire to avoid personal liability under the Trading With the Enemy Act. Their right was not exercised in conformity with the corporate interest. According to the commercial court of Corbeil,220 the shareholders were abusing their legal right. Therefore their decision was void and a temporary administrator was named to head Fruehauf France in accordance with the corporation's interest and to execute the contract that Fruehauf has signed with Berliet.

Therefore any French subsidiary or affiliate of a US company, which would be pressed by its parent to comply with an embargo decided by the US government and in which the French government is not a party, legally may refuse to comply with the request of its parent. Any concerned party ("parties ayant un interet a agir") may go to a French court arguing that the shareholders decision is an abuse of their legal right and therefore void.
b. The Right of Requisition.

The State's right of requisition was first used in war time, and in the beginning, requisitions were allowed only for military purposes. On the eve of World War II, thinking with just cause that the armed conflict would put the nation in danger, the French legislature enacted the law of July 11, 1938 on the *organisation générale de la Nation en temps de guerre* (the organization of the nation during war time) in which Title II allowed requisitions for civilian purposes. At the end of the conflict, the principle of requisition for civilian purposes was kept and codified with the enactment of the Ordinance of 1945. Such ordinance could be, and has been used by French administrations to forbid French companies from complying with embargoes imposed by non-French authorities.

French law allows the administration to compel individuals as entities to transfer real or personal property or do something of general interest when "*des besoins exceptionnels et temporaires reconnus d'interet general*" (exceptional and temporary needs recognized of general interest) are present. The court having broadly interpreted the notion of general interest. Compliance with an American embargo which is likely to ruin the financial equilibrium and the moral credit of a company may be avoided by requisitioning the company.
Conclusion

Foreign subsidiaries and customers of American business entities lose sales due to the burdensome restrictions imposed by United States export controls. Most of the actual blocking laws are unable effectively to protect against the extraterritorial application of the US EAA requirements. Most of these blocking laws are ad hoc answers to the extraterritorial application of US antitrust law. Their main objective is to avoid "treble damage" judgments rendered in the US against a foreign defendant being enforced in the defendant's home country. Because such laws can only prevent the enforcement of a judgment rendered in the US, and because the US government will hardly ever sue for damages as a result of the diversion of strategic American goods, blocking legislation will be of a limited use in export control matters. Generally, the US government punishes a diverter of US strategic goods by putting its name on the Table of Denial Orders (TDO). Such listing of a company or/and its principals on the TDO is an unilateral act of the US government and not the result of a lawsuit. Although EAA ordinarily requires notice to the charged party and an opportunity for a hearing, efforts by the home country to counteract this listing will probably be unavailing. At worst, the entity charged with diversion may be put in the unenviable position of "foreign
compulsion"—being required by one government to perform an act which another government prohibits.

The control of the movement of strategic goods is an issue which concerns all the "free world" and cannot be solved by unilateral decisions. The "free world" will only have an effective system of control when a multilateral export control system will be adopted. During the past months one of the priorities of the US Department of Commerce has been to stimulate mutual cooperation between the United States and its allies on export control issues. "The United States has initiated an unprecedent number of bilateral and multilateral meetings to strengthen mutual cooperation." The DOC is trying to renew the Commodity Control List (CCL) in cooperation with COCOM countries in order to purge from the list relatively low or old technology and keep only militarily critical items. The DOC wants to reduce and eventually eliminate the requirement of a license for transfers of all technology among COCOM countries. If such a "licensing free zone" could be established, this would lift an enormous economic burden from American companies, and their subsidiaries and affiliates, for "West-West" trade, and would permit the allies to obtain more rapid access to get quicker access to United States technology. To start the establishment of a multilateral system of control of the transfer of strategic goods should be analyzed by the Department of Defense and not systematically rejected. Such implementation of common principles and minimum standards, between the United States and COCOM countries, for export licensing requirements would reinforce the common security of the "free world" and at the same time help to decrease the United States deficit.
FOOTNOTES


3. Id. at 2.


7. Harold J. Berman and John R. Garron, United States Export Controls--Past Present and Future, 57 Colum. L. Rev., 791-890 (1967). In 1898, three days prior to declaration of war against Spain, a joint resolution of Congress authorized the President to prohibit the exports of coal or other materials used in war from any seaport in the United States until otherwise ordered by the President or by Congress" (Joint Resolution of April 22, 1898, No. 25, 30 Stat. 739). This first restriction to export confine President power in the U.S. territory forbidding any extraterritorial reach. 1912 This joint resolution was amended in 1919 "to prohibit except as the President shall prescribe, the export of "arms or minition of war" to any American country (in which there exist) condition of domestic violence (promoted by the availability of U.S. arms)" (S.J. Res. 89, 37 Stat. 630 (1912)). 1917 After the U.S. entered into World War I, Congress authorized the President to restrict "during the present war" the export of any articles to any country to be named in a Presidential proclamation (Act of June 15, 1917, ch. 30, tit VII, 1, 40 Stat. 225).

Then the trading with the Enemy Act of October 6, 1917, (ch. 706, 40 Stat. 411) made it unlawful for any person in the U.S., except with the license of the President, to trade with designated enemies or with nationals, agents or allies of such enemies. 1922 The Joint resolution of April 22, 1898 and March 14, 1912 were
repealed and replaced by a joint resolution of January 31, 1922 (S. J. Res. 124, ch. 44, 42 Stat. 361 (1922), which extended the scope of the President's authority to license exports of arms or munitions to include "any country in which the U.S. exercises extraterritorial jurisdiction." In this resolution extraterritorial reaction of president power is expressly affirmed. 1935 The Neutrality Act of August 31, 1935 (ch. 837, 49 stat. 108) authorized the President to control the exportation of arms, ammunition, or implements to war to any belligerent country during the progress of war between or among, two or more foreign states. 1937 Amendment to the Neutrality Act authorized the President to place restrictions on "the shipment of certain articles or materials in addition to arms, ammunition or implements of war from the U.S. to belligerent states, or to a state where civil strife exists..." if such restrictions are "necessary to promote the security or preserve the peace of the U.S. or to protect the lives of citizens of the U.S." S.J. Res. 51, ch 146, 2(a), 50 Stat. 122 (1937). 1939 These powers were continued on the Neutrality Act of November 4, 1939 (ch. 2, 54 Stat. 4) which gave more power to the President, pursuant to a declaration that there exists a state of war between foreign countries, the president could restrict the export of any articles or materials to any such countries. 1940 With the beginning of World War II, the Congress passes "An Act to Expedite the Strengthening of the National Defense" (ch. 508, 54 Stat. 712) section 6 of which authorized the President to prohibit or curtail the exportation from the United States "of any military equipment or munitions, or component part thereof, or machinery, tools or materials, or supplies necessary for the manufacture, servicing or operation thereof .... In 1941 Section 6 was extended to cover exports from all territories, dependencies, and possessions of the U.S. (S.J. Res. 76, ch. 134, 55 Stat. 206(141). Then an Act of June 30, 1942 (ch. 461, 56 Stat. 463) Section 6 was broadened to include "any articles, technical data, materials or supplies."


10. In June 1951 with the extension and amendment of the Export Administration Act of 1949 the administration was still willing to treat the Export Control Act as a temporary measure and frequently declared its intention to eliminate controls as soon as possible (Joint Resolution of May 16, 1951, ch. 83, 65 Stat. 43).


12. The Export Administration Act of 1969 established what we can call a "qualified free trade." On one hand the legislation recognized the necessity of Export Control while on the other hand the legislation noted that restriction of exports and uncertainty


14. The Act of 1969 was amended two times before its expiration on September 30, 1976. First, the 1972 amendment directed the President an escape route if he should determine that decontrolling an item would threaten national security. Second, the 1974 amendment took into account the fact that the improvements in political relations between the U.S. and the Soviet Union though imminent had not taken place. This is the share of the imposition of export controls between the Department of Defense and the Department of Commerce, the role of the Department of Defense was enhanced. In 1976 when the 1969 Act expired, the President issued a stop gap executive order permitting to continue the administration of Export Control system under the Trade with the Enemy Act. The prime focus of the 1977 Amendments was the Arab League's boycott on Israel and the resulting section 8 of the 1979 Act.


18. Philip L. Ray Jr., Guide to Export Controls (1985). Unlike the Export Administration Act of 1969, which had the authority for national security, foreign policy and short supply controls in one section (50 U.S.C. app. Section 2403(b)(1) (1976) the Export Administration Act of 1979 separates the authority for each type of control into distinct sections. This division has been kept in the 1985 Export Administration Act. All three sections used the same basic formula but there are differences Section 5(a) authorizing national security control restrict "good or technology" 50 U.S.C. app. section 2404(a) (1986). Section 6(a) authorizing foreign policy controls, however restrict "good technology or other informations" 50 U.S.C. app. section 2405(a) (1986). Section 7(a) authorizing short supply control restrict only "goods" section 2406(a).

The Export Administration Act of 1979 policy statement restructured the order of the Export Administration Act of 1969 as to place these three purposes of export controls in the descending order of their importance. H.R. Rep. No. 200, 96th Cong., 1st Sess. 15 (1979). The order established by the 1979 Export Administration Act
and maintained in the 1985 Export Administration Act (i.e., National Security, Foreign Policy: Short Supply) as the order under the 1969 Export Administration Act (short supply, foreign policy, and national security) reflected priorities of the Export Administration Act.


Firms which plans to make successive shipments of the same goods to the same nation (if this nation is not a "controlled nation") can obtain a multiple Export License and therefore will not be required to obtain a new license for each shipment. Also, low technology or goods which are readily available abroad may be exported to COCOM’s members without license. For a good analysis of the new distribution license see: Gregory LeHerman, *Exporting High Technology from the United States under the revised distribution license procedure*, 7 Computer L.J., 289-325 (1987)


23. The Shipper’s Export Declaration (SED) is the only form that must be completed for shipments under a general license. The SED is the final export control document that must be presented to Customs officials at the port of export. An SED is required for all goods shipped from the United States whether under a validated license, a general license or no license. (For certain exports to Canada, no license is required.)

24. The goal of the "destination control statement" is to serve notice to all carriers and foreign parties that the commodities and technical data are licensed only for shipment to specified destination and that diversion contrary to U.S. law is prohibited.

25. In administering export controls, the Department of Commerce maintains a classification of Country Groups to which exports are controlled for national security purposes presently Commerce classified the world into seven country groups which requirements vary considerably from group to group. Such classification is a pure creation of the Department of Commerce. For instance, Martinique which is a French overseas department is classified in Group T when France is classified in Group V. 15 C.F.R. Section 370 (Supp. No. 1) (1985). Canada is not included in any of the country groups and most of the export to Canada can be made without a license.

The countries may often change to one group from another one to follow the U.S. foreign policy.
26. The Commodity Control list is the master list of all commodities and technologies under the control of the Office of Export Administration. The Commodity Control list contains general categories. 15 C.F.R. Section 399.1(b). The C.C.L. indicates what kind of license applies to a specific exportation according to the category to which the technology or the goods belong, the country group to which the importer belongs, the value of the exportation and other factors.

27. 15 C.F.R. Section 387.1.

28. In April 1988 a company called EIP Microwave, located in California, has been suspended or debarred from its government contracting because of an export licensing violation. This kind of penalty for export licensing violation is potentially very interesting. In Raytheon Manufacturing Co., et al. 24 Fed. Reg. 2626 (1959) an English company was denied export privileges for one year for "knowing violation" of the regulations because it has "concluded erroneously" that the goods it has received from the U.S. in parts were not any longer subject to Export Controls. Two U.S. parties to the transaction were also denied privileges, even though neither had actual knowledge of any violation the court found that they "knowingly" violated export controls by failing "to make effective inquiries as to possible shipment by the consignee abroad. Otherwise they "improperly assumed" that the country of ultimate destination of the goods to be exported was the country in which the consignee conducted his business. Hydrocarbon Research Inc., et al 27 Fed. Reg. 12, 487 (1962) "knowing violation" included negligence in not ascertaining whether "know how" required an export license.

Failure to "sufficiently check who the end user was going to be" could lead to the imposition of sanctions for "knowing violation" Defense vs Tektronix, 137 Sales and Marketing Management, 20 (December 1986). The term "sufficiently" has never been defined. Therefore, in a certain way, a Damocles sword is over all U.S. firms and foreign companies which export high technology products. Too often foreign companies forget that they have a duty to inquire how U.S. law affects them. Patrick B. Fazzone, Business Effects of the Extraterritorial reach of the U.S. Export Control Laws, 15 J. INT'L L. & POL., 545-594 (1983).


30. Khrutchev is reported to have said that the "US should embargo buttons because they are used to hold up Soviet soldier's pants." Birmingham and Johnson, A Rational Approach to Export Controls, 57 Foreign Aff., 894-895 (1979).


34. It's in 1977 that the scope of jurisdiction was broadened (Act of Dec. 28, 1977) Pub. L. No. 95-223, 301, 91 Stat. 1629). This amendment gave to the President the authority for controlling export of non U.S. origin goods and technology by foreign subsidiaries of U.S. concerns. Prior to the 1977 amendment (Act of December 28, 1977, Pub. L. No. 95-223, Section 301, 91 Stat. 1629). The Trading with the Enemy Act of 1917 was used to control foreign origin export by U.S. owned or controlled foreign firms. The goal of the 1977 amendment was "to broaden the potential reach of peacetime, nonemergency foreign policy controls to exports by foreign subsidiaries of all product and data (not merely strategic) to all destinations (not merely the embargoed nations and other Communist countries) Abbott, Linking Trade to Political Goals--Foreign Policy Export Controls in the 1970s and 1980s, 65 Minn. L. Rev. 739, 772-77 (1981).


36. Ships have the nationality of the nation state whose flag they fly. There is a "genuine" link (i.e., of the nation state regulates the technical and social matters of the ship) between the ship and the state.

37. The E.E.C. countries have rejected the theory of contamination, stating especially in its claim during the Pipeline Embargo that "goods and technologies do not have any nationality and there are no rules for using goods or technology situated abroad as a basis of establishing jurisdiction over the persons controlling them." European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R., 21 INT'L. Legal Materials 891 (1982). Extraterritorial application of United States Law: The Case of export controls, 132 U. PA. L. REV., 355-390 (1984).

38. "Reexport" means the further shipping or transmitting of the exported good or technology intact from the importing country to a third country.


43. Many factors are used in different jurisdictions to determine the "seat" of a corporation. These factors include the corporate headquarters, the place where the board of directors meets or the location of the general meeting of the shareholders. Hadare, The Choice of Law Applicable to the Multinational Enterprise and the Nationality of Such Enterprise, 1974 Duke L.J. 1 (1974).

44. Sumitomo Shoji America, Inc. v. Avaglione, 102 S.Ct. 2374 (1982) a wholly owned Japanese subsidiary incorporated in New York was recognized by the Supreme Court as an American Corporation.

45. Barcelona Traction, Light and Power Co., 1970 I.C.J. 3, 41-45 (Judgment of Feb. 5). The Court states that a corporation is a national of the state under the law of which it was incorporated and in whose territory it has its registered office.

46. 15 C.F.R. Section 369 1(c)(2)(i)(1983).

47. 15 C.F.R. Section 369 1(c)(2)(ii)(1983).


49. Cohn and Simites, Lifting the veil in the Company Laws of the European Continent, 12 INT'L & COMP. L.Q., 189-221 (1983). When the subsidiary is in fact controlled by the U.S. parent company, the court must pierce the "apparent veil" by not considering the corporation as a national of the country where it is formally incorporated. The subsidiary must have the nationality of the parent which in fact manages or controls it.

50. 7 Fed. Reg. 2503.04 (1942). Under the regulations, the following were also considered persons "subject to the jurisdiction of the United States."

1) Any citizen of the United States whether within the United States or within any foreign country.

2) Any person within the United States

3) Any partnership, association, corporation or other organization:

(a) which is organized under the law of the U.S.; or
(b) which has its principal place of business within the United States; or

(c) which is owned or controlled by, directly or indirectly, one or more persons subject to the jurisdiction of the United States as herein defined.


52. A state has no power over him: If sovereignty is different from omnipotence and arbitrary is only because the state freely, without preliminary limitation, establishes its own Constitution. This document is a guideline for the state’s self restraint for its sovereignty. Benoit Jeanneau, *Droit Constitutionnel et institutions Politiques*, 4-6 (1981).


53. External sovereignty empowers a nation state to establish its own foreign policy without interference in its decisions by foreign nation state.


55. *Shooper Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116-136 (1812). By definition, each nation’s jurisdiction, within its own boundaries is both exclusive and absolute. The only limits on its power is that which it chooses to accept itself.

56. Five exceptions have been recognized; those recognized by the international comity are:

(1) the nationality principle, under which a nation can exercise jurisdiction over its nationals anywhere in the world

(2) the protective principle or effect principle, under which a nation can prescribe rules of law for conduct outside its territory that threatens its security as a nation

(3) the universality principle, under which a nation can exercise jurisdiction over certain offenses, such as piracy, that are universally prohibited

(4) the passive personality principle under which a state can exercise jurisdiction over the offense due to the nationality of the victim.

(5) the objective territorial "principle" or "effect doctrine" under which a nation "may impose liabilities, even upon persons not
within its allegiance, for conduct outside it sborders that has consequences within its borders which the state reprehends" this principle, which has been adopted by the American jurisprudence in 1965. United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945) is not recognized by a majority of nations.


57. President Reagan "reviewed the sanctions of oil and gas equipment to the Soviet Union imposed on December 30, 1981 and decided to extend these sanctions through adoption of new regulations to include equipment produced by subsidiaries of U.S. companies abroad, as well as equipment produced abroad under licenses issued by U.S. companies." Statement of Extension of U.S. sanctions June 18, 1982, reproduced from the Weekly Compilation of Presidential Documents, Volume 18, Number 24 (June 21, 1982), p. 820.

58. That means foreign policy authority.


64. Charles P. Kincannon, The Dresser Case: one step too far, 5 N.Y.L. Sch. J. INT'L & COMP. L., 191-230 (1986). The doctrine concerning corporation nationality does not recognize the concept of control as a basis for jurisdiction. However certain commentators recognize the validity of control as a sufficient link for jurisdiction in international law, when it is used for defensive purposes and not offensive purposes.


66. Alcoa, 148 F.2d at 443.

68. Until the 19th Century the world was carved into jurisdictional spheres corresponding to the territories of states. This strict territorial principle was a system in which nation's regulatory goals of predictability and comity was fulfilled.

With the internationalization of the world, it became necessary to expand the territorial principle so to include the so called "objective territorial" or "effect principle." This extension was first recognized in criminal legislation (A and B are at the border between State A' and State B', A is on A' side B is on B' side A shoot B--the "effect principle allow B' jurisdiction. But at the same time, the effect principle was consistent with the principle of territoriality because it was applied only when the consequences of the conduct could be "localized." The judicial opinion marking the beginning of the desintegration was the Lotus Case (Permanent Court of International Justice 1927 reprinted in Henry S. Steiner and Detlev F. Vagts, Transnational Legal Problems, 817-826 (1985)). Still, transnational jurisdiction was only allowed in criminal cases. In most of the situations the different governments agreed that sanctions should be imposed. Even in the Lotus case, French and Turkish law did not express significantly different policies, assuming that Lieutenant Demons had acted recklessly. Nor did the prospections in Wildenhus's case--Mali v. Keeper of the Common Jail Supreme Court of the United States, 1887, 120 U.S. 1, 7 S.Ct. 385, 30 L.Ed. 565 -- or United States v. Browman-- Supreme Court of the U.S., 1922 260 U.S. 94, 43 S.Ct. 39, 67 L.Ed. 149--threatening legitimate policies of other countries on criminal sanctions. The problem was not the "punishable" character of the conduct, but who should be competent to decide whether to punish.

When the "effect doctrine" was used to justify transnational jurisdiction in field of economic regulation many controversy arises. The problem was not only who should regulate, but what that regulation should be. Significant contrasts emerge between policies of different countries. Even nations with market-oriented economies reflect divergent approaches. The Alcoa case recognized "the transnational jurisdiction of economic regulation." Prior to this judgment, courts have generally adhered to the territorial principle in applying antitrust law. The "effect principle" as applied in Alcoa however eliminated the requirement of a close relationship between the conduct and its effects. According to the test established by Judge Hand, a nation could have jurisdiction over any conduct outside "its borders that has consequences which the state reprehends." The Alcoa decision became an open door justifying universal jurisdiction. The Restatement (Second) of Foreign Relation Law tried to limit the scope of the effect doctrine by requiring that the effect be "direct, foreseeable and substantial. Yet these terms are vague and interpreted differently by the courts. The courts have adopted a two part jurisdictional inquiry. The court first inquires if the conduct has an effect in the United States; then it balances the competing interests to determine which nation has the strongest basis for jurisdiction. This concept of a "balancing comity" test gained significant attention in the United States with the
publication in 1959 of Antitrust and American Business abroad by Professor Kingman Brewster. But Brewster's suggestions were not accepted by the courts until 1976. However the balancing list established by Timberlane is instructional and although the court provides a list of factors to be considered in applying the balancing test, the opinion gives any guidelines as to how court had to evaluate these factors. Therefore the "comity balancing" test is a political and not a legal solution which cannot be an effective limitation to extraterritorial jurisdiction. Civil law jurisdiction such as French, Italy ... are apprehensive of the "gouvernement des juges--be governed by judicial action and would never give judges such broad and discretionary powers.


74. Until now there are no American cases in which conduct overseas that threaten American national security have been subject to American jurisdiction pursuant to the protective principle.

75. The Tentative Restatement of Foreign Relations Law (Revised) enumerates espionage, counterfeiting of the nation seal or currency, the falsification of official documents, perjury before consular officials, and conspiracies to violate the immigration or custom laws as examples of crimes to which the protective principle might be applied. Restatement of the Foreign Relation Law of the United States (Revised) Section 402, comment b (Tent. Draft No. 2 1981).


77. Id. 69.

78. Such a clause is common in contracts between European companies and United States companies. Following are some examples:
Example 1

Products of Company and information about them represent U.S. origin goods and technical data; as such, they are subject to licensing and other export restrictions under U.S. law. Customer acknowledges this and agrees to comply with all applicable export and reexport restrictions, including obtaining any required U.S. Government Customer acknowledges that it is knowledgeable about U.S. government export restrictions or that it will become so prior to engaging, directly or indirectly, in any export transaction involving Company products or information about them. Company will, upon customer request, provide customer with current information regarding such restrictions. Customer further agrees that if it resells or other disposes of any such products or information about them, it will obtain similar agreements from each transferee. Customer will give Company, upon its request, proof of compliance with these U.S. export restrictions, and Company may withhold deliveries to the customer until such proof is received.

Example 2

1. LICENSEE agrees that it will not, without prior authorization from the U.S. Office of Export Administration, re-export, directly or indirectly, any LICENSOR Technical Information to any country where re-export is prohibited by the laws and regulations as of the effective date of this Agreement are Rumania, Zimbabwe, Poland, Albania, Bulgaria, Czechoslovakia, East Germany (Soviet Zone of Germany and Soviet Sector of Berlin), Estonia, Hungary, laos, Latvia, Lithuania, Outer Mongolia, People’s Republic of China (excluding Republic of China (Taiwan) (Formosa)), USSR, Cambodia, Cuba, North Korea, Vietnam and Afghanistan.

2. LICENSEE agrees that it will not export directly or indirectly the direct products using the LICENSOR Technical Information, to any country where such export is prohibited by the laws or regulations of the United States of America as may be In force from time to time. Countries to which such direct products cannot be exported as of the effective date of this Agreement are set forth in paragraph 1, above.

3. No LICENSOR Technical Information may be exported directly or indirectly to the Republic of South Africa or Namibia where LICENSEE knows or has reason to know that the LICENSOR Technical Information or any products produced using the LICENSOR Technical Information are for delivery to or for use by the military or police entities or for use in servicing equipment owned or controlled by such entities in such countries.

4. The obligations of LICENSEE under this ARTICLE shall fully apply to any sublicensee of LICENSEE.

5. The LICENSOR Technical Information and the direct product thereof to which the obligations of this ARTICLE apply are described in the Export Administration Regulations of the United States Department of Commerce and more particularly the Commodity Control List of such regulations, part 399.1, entry number 1763A (dated Oct. 1, 1981). The obligations of this ARTICLE are further described in the Export Administration Regulations of the United States Department of Commerce, Part 379 and more particularly Part 379.4(e) and (f)(2)
(dated Jan. 25, 1982). LICENSOR will notify LICENSEE of any modification in the above regulations whenever they occur.

79. If an American company adheres to a foreign nation boycott measures decided by a foreign sovereign nation even though U.S. law or regulations have not been imposed concerning boycott company violates U.S. public order and can be prosecuted under the antiboycott provisions of the Export Administration Act.

80. The unhappy experience of South American countries during the 19th century with diplomatic and military intervention by foreign nation on behalf of foreign investors led to the development of the Calvo doctrine. This doctrine states that a foreigner doing business in a country is entitled only to nondiscriminatory treatment and that by entering the country he implied by consents to be treated in the same manner as its nations; the foreigner therefore renounces the diplomatic protection of his home country. United States of America v. United Mexican States reprinted in Henry J. Steiner and Detlev F. Vagts, Transnational Legal Problems, 553-561 (1985).


82. Generally if the buyer takes the risk to contract with an U.S. seller, it is because such good and technologies are not available elsewhere. Thus, in most of the cases, submission is not really voluntary. The agreement is a "contrat d'adhésion"-preestablished contract--and the buyer has only the choice to take the goods and technology and sign the submission clause, or to leave the goods and technology.

83. Id. 69.

84. The power of international law vis a vis domestic law varies from country to country. In the United Kingdom international law has no force until it is specifically "incorporated" into the states law of Great Britain by an act of Parliament. In Italia as in France domestic law must be conform with the principle of international law. In the U.S. international law is a part of the law of the land and will be given effect unless it is contrary to an act of Congress given the divergent states of international law in various countries. The basis of the litigation will determine the relative importance of international law in a dispute over export controls.

85. Extraterritorial application of export controls is contrary to international law. Thus the president is not constitutionally authorized to control export outside the territorial boundaries of the U.S. except with a "clear and affirmative congressional delegation." United States v. Mitchell, 553 F.2d 996, 1002 (5th Cir. 1977), Benz v. Campania Navierce Hidalgo, 353 U.S. 138, 146-47 (1957) of an established rule of statutory construction says that a Congressional Act presumptively does not apply extraterritorially. Foley Bross v. Filarolo, 336 U.S. 281, 285 (1949). Restatement
(Second) of Foreign Relations Law Section 38 (1965) states "Rule of U.S. statutory law, whether prescribed by federal or state authority, apply only to conduct occurring within or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute."

86. However certain observers found the language and legislative history of the act unclear. This position is illustrated by a statement of Alexander Trowbridge--President of the National Association of Manufacturers--during the 97th Congressional Session of 1982:

"The legislative history of this amendment reveals more than a little confusion over what power Members of Congress thought they were granting the President." Economic Relation with the Soviet Union: Hearings before the Senate Subcommittee on International Economic Policy and the Senate Committee on Foreign Relations, 97th Cong., 2d sess. 195 (1982).

87. Senate Report. In 1979 the Senate proposed an amendment which would have prohibited controls on non U.S. technologies or good exported by foreign subsidiaries controlled or owned by Americans. The amendment was rejected. In 1983 the Senate proposed an amendment requiring that "prior to the imposition of foreign policy controls, the President determines that such controls will not have an extraterritorial effect on countries friendly to the U.S." S. 979 reprinted in Donald J. Hasfurther, material prepared for the U.S. Chamber of Commerce. The 1985 Export Administration Act recognizes this idea enonciating criteria that the President must take into consideration before imposing export controls 50 U.S.C. App. 2405(b) (1986). Therefore the principle is the territorial application of export controls. However when foreign nations do not support U.S. policy, conflicts will arise when controls are imposed for foreign policy reasons. During the debates surrounding the elaboration of the 1985 Export Administration Act, it was suggested that export controls be suppressed but the Export Administration Act of 1985 maintained export controls are for foreign policy reasons. The President is allowed to override foreign nation's policies by imposing export control extraterritorially. House report: In 1979 the house rejected an amendment that would eliminate reexport controls on U.S. goods and technology in certain specified countries. The House decided that reexport controls were a necessary evil without which there would be an "enormous loophole through which third country transfer could legally be made. In 1983 the House suggested inserting a "consultation provision" requiring "the President to receive specific Congressional approval (legislation) prior to the imposition of controls on U.S. subsidiaries, licensees and other affiliates abroad." This requirement does not appear in the Export Administration Act of 1985.

The Export Administration Act of 1985: Still authorizes extraterritorial application of export controls but limits Presidential authority to break contracts into which United States
firms have entered for the export of reexport of goods." The President may break such contracts only where a "breach of peace" threatens the strategic interest of the United States and only after consulting with Congress. In such consultations (in order to break a contract) the President must certify that the breaking of a contract will be "instrumental" in remedying a situation posing a "direct threat" to the strategic interest of the United States. The Act of 1985 further states that the breaking of contracts by the President can continue only so long as the direct threat to the strategic interests of the United States continues" Export Administration Amendment Act of 1985, Pub. L. No. 99.64 Section 108(c).

88. According to the American Constitution Art I Section 8, the Congress has the power to regulate "interstate and foreign commerce." However Congress can delegate such power to the President. Under the necessary and proper clause of Article I Section 8, any constitutionally granted congressional power "implies a power [to delegate] authority under it sufficient to effect its purposes" Lichter v. United States, 334 U.S. 742 (1948) Tribe, American Constitutional Law, 284-291 (1978) John E. Nowak, Ronald D. Rotunda, L. Nelson Young, Constitutional Law, 189-219 (1986).


90. Steven Elliott, Extraterritorility and the Western Alliance.

91. 4 INT’L TRADE REP. Current Rep., 477 (1977). "The Export Control System is already a mess that is costing Oregon high tech exporters at least $32 million a year in sales, not to mention loss of job" according to Rep. Les Aucoin (D. ORE).

Steven L. Dryclen, The Pentagon won’t Budge on high-tech trade, Busn. Week, Dec. 7, (9187).

92. Certain sectors, as the EU Aerospace are reducing their dependence on American know how.

93. Steven Elliott, Extraterritoriality and the Western Alliance, Annual Meeting of the International Studies Association, South, University of South Carolina (October 1985).

94. The Sperry Univac case is a good example of how Europe has been able to develop its own technology and goods. In 1977, Sperry Univac contracted to sell a Univac computer system for $6.8 million to TASS, The Soviet News Agency. On August 1, 1978, for foreign policy considerations, the license was denied (later, as the relation
between the US and USSR improved, the American government wished to reconsider the application in a more favorable light. The following year, France was able to offer to the USSR a more sophisticated computer that could be built without any U.S. technology or component involved. On March 27, 1979 the USSR contracted with the French firm.

95. Export controls are the reason for the loss of many contracts or the decrease of their value. A businessman remembered the following case: his company is an European subsidiary of an American company. He received an order from the USSR for certain machines, these machines were not mentioned on COCOM lists but contained a U.S. component. The DOC therefore refused to provide a license to reexport the component. Whereupon the USSR sent the European company a similar component to use instead of the US component. The machine was delivered some months later to the USSR. In this tragic comic story, cost to our firm involved expenses. The US firm providing the component list of contract at the USSR improve its ability to build such a component., Harold Tehman, Fin. Times, April 4, 1985.


97. Countries from the East bloc generally will prefer to buy goods and technologies from a firm not subject to US export controls even if such products are more expensive.

98. Y. Borechut and L. H. Jacob and S. Latchminan, nouvelle technologies et enjeux sociaux, 125-140 (1986).

99. Export controls are the main reason for the loss of many markets and therefore contributes to the trade deficit. This thereby contributes to inflationary pressures and monetary instability. This contradictory that US legislation can be one cause of a loss of trade in a foreign country.


101. It is contradictory for the US administration to argue through the OECD for non-discriminatory or national treatment by host governments or inward investment while, at the same time, claiming the unilateral right to influence and, perhaps, damage the operations of overseas subsidiaries of US companies for foreign policy purposes.

102. The Export Administration Act of 1985 attempts to eliminate this possibility but some gaps still seem to exist.

103. In 1982 France bought for FF2.5 billion licenses and patents from the U.S. 83% of the patents and licenses that France bought in the field of aviation and armament were US while 73% of
data processing that France bought were US. G. Nicaud, Le Figaro, Oct. 29 (1985).


105. The supporters of these retroactive powers argued that foreign policy controls would often be ineffective if the president could not void existing contracts. This argument is not suitable for the foreign policy measures based in the foreign policy section of the Export Administration Act.

Contrary to the national security section of the Export Administration Act, the foreign policy section of that same act is intended to show the US position on various issues, not to deny strategic goods to East bloc countries. Therefore if the US chooses to use export controls as a foreign policy tool, it is its choice and this economic choice can only be imposed inside the boundaries of the United States and not outside of it. Imposing such a policy outside US territory constitutes an inadmissible infringement of foreign sovereignty. Furthermore, the economic cost as a result of the breach of existing contracts can be supported by the US economy but certainly not by European countries. Even though foreign trade is becoming increasingly important to the US economy, it still represents so far greater proportion of most Western European countries GNPs, id. at 70. Western European exports to the Soviet Union are significantly greater than those to the US. West Germany is the largest single supplier of Western technology to the Soviet Union, for example, and the Soviet Union is Germany's most important trading partner. France depends less on trade the the USSR than Germany but more than the US of trade with the USSR. In the early 1980s trade with the East represented 3 or 4% of France's total trade; the amount was 6 to 8% for Germany and only 1 to 3% for the USA. In 1984, export to the USSR totalled approximately $9.48 billion from Europe American export to the Soviet Union about $3.28 billion Directory of Trade Statistic Yearbook of the IMF, 60 and 401 (1985).


107. Id. at 100.

108. According to the effect doctrine conduct occurring outside the territory but causing direct, foreseeable and substantial effect (which are also constituent element of a crime or tort) within the territory may be proscribed 2nd Restatement 18.

109. According to Henry Kissinger, two approaches have characterized East-West trade. On one hand, the "psychiatric" approach, in which relations among nations are similar to the relations among people and constitute an act of goodwill "trade" is seen as an attempt to obtain positive behavior changes. On the other hand, the theological approach considers that the world is divided in two camps: the good and evil. It sees the Soviet as evil.
According to this approach the Soviet system is doomed to collapse if it does not receive economic assistance from the West. Henry Kissinger, Address delivered at the international investors conference sponsored by the American Stock Exchange, Washington, DC. October 22 (1982).

110. In the pipeline embargo controversy it was estimated that while US based companies would lose $300 million-500 million, West European subsidiaries and licenses stood to lose up to $1.6 billion. Joseph E. Paltiron, Extraterritorial Enforcement of the Export Administration Act in Michael R. Ginkota (ed.) Export Controls: Building reasonable Commercial Ties with Political Adversaries, (Praeger: New York 1984), p. 87-102.

111. In January 1982, Gas de France signed with Soyuzaz export an agreement according to which the USSR would deliver to France from 1984 to 2009 8 billion cubic meters of gas. Jacques Delor, Minister of the Economy and Finance, saw this agreement as a way to diversify French energy resources. M. Jacques Chirac (RPR) and H. Andre Bergeron (FD) argued that this contract will place France in a situation of dependency from gas purchases from the Soviet Union. This danger will increase after 1993 when Lacq deposits and Grominque (in the Netherlands) will not be able to cover France energy supply. Romain Yakimtchouk, Transferts de Technologies Sensibles entre l'Est et l'Ouest, 4 Studia diplomatica, 397-552 (1984).

112. The Sanctity of Contract Provision adopted in 1985 is weaker than the Export bill considered by the Senate in the 98th Congress. But it still is stronger than the House bill considered in the 98th Congress. The House bill contained so many exceptions as to render its possible effect void.

113. Therefore it will be wise in the future to specify clearly in all contracts who will be liable in case of breach of contract. This will clearly allocates the risks between the parties by the insertion of a force majeure clause. For a discussion of the force majeure clause: Fazzone, Business Effects of the Extraterritorial Reach of the US Export Control Laws, 15 J. INT'L L. & POL., 545-594 (1983).

114. Former US Secretary of State, Dean Rusk noted that US firms are "trying to race for foreign markets wearing infantry boots and full packs while competitors are wearing track shoes and shorts." Secretary's Dean Rusk emphasized that looking upon trade as a "favor" is a luxury the United States can no longer afford, given its large present trade deficit. Statement of the Honorable Dean Rusk, in Hearings, Senate Committee on Banking, Housing and Urban Affairs, Use of Export Controls and Export Credits for Foreign Policy purposes (1978).

115. Professor G. G. Bertsch, an expert on America East-West policy, noted that the US has not a global, consistent and long term
policy in the field of East-West relations. Instead for the past few years, the United States has adopted a short term policy.


117. In addressing the strategic dimensions of East-West trade, three types of trade ought to be distinguished: Commodity trade to which the end of such trade is strictly civil. Trade with a clear military end use. This area does not pose serious problems for US policy makers in East-West trade. Such trade is strictly prohibited under the US Arms Export Control Act, the mitions lists and under the multilateral COCOM lists; and Dual Use, technologies and goods proposed for sale for civilian or commercial use which may also have significant military applications. This area is grey. There is no certainty or clear understanding of what technology is and under what circumstances it can be considered "strategic." No Export Control Strategy can be established with certainty and therefore there is uncertainty that a license will be given or denied.

118. "A Washington DC survey polled several thousand respondents confirmed that slowness and uncertainty (i.e., difficulty to determine individual responsibility for what occurred and when it does occur) remain the two top deficiencies of administration." D. S. Brown, Public Administration Times, January 15, 1981, p. 12. "In international business transactions, certainty of procedures and respect for time deadlines are critical to competiveness." John R. McIntyre, Uncertainty in Business-Government Relations: The Dynamics of International Trade Policy, (1983). The unpredictability inherent in the issuance of a license (a validated license especially) is due to the ambiguity of the statutory language. Such ambiguity prevents the administration from developing adequate policy criteria to guide the export licensing bureaucracy in making day to day decisions.

119. Roger L. Robinson, The importance of Time in administrative decision making, (1983). "Export licenses issued by Commerce used to be hand carried through 19 different steps...We put a pedometer on one of our licensing officers and found the paper travelled 2 1/2 miles on four different floors." The Pentagon won't budge on high-tech trade, Busn. Week, Dec. 7 (1987). Today, computers have cut licensing time. STELA, which can be reached by phone, (202) 377-2752 allows exporters to check the current status of their license application.


121. Becker showed that, after a certain "waiting time" whatever the goods' price, the good was no longer in demand. Due to its experience he posited a price ceiling for that good (below the market price) and a production subsidy sufficient to maintain the same level
of output and decide that the good should be distributed on a first come, first serve basis. A line of consumers will develop and grow until the individuals find that the expected cost of joining the line is so high as to discourage the excess demand. In other words the total cost of the commodity remained unchanged, indirect time costs and substituted for direct good costs. Gary S. Becker, A Theory of the Allocation of Time" ECON. J., 493-517 (1985).


The enforcement staff has grown from 39 in FY 1980 to 161 in FY 1987. Statement by Dr. Paul Freedenberg before the Committee on Foreign Affairs subcommittee on international economic policy and trade in House of Representatives, Nov. 3 (1987).

123. The Department of Commerce has already indicated, however, that, despite these new statutory requirements, it will attempt to design regulations to increase license proceeding time in a number of situations. Dean L. Overman, Reauthorization of the Export Administration Act: Balancing Trade Policy with National Security, 17 LAW & POL'Y INT'L BUS. (1985).

124. The term is suggested by the concept of an inflationary psychology which occurs when consumers expect inflation to continue; consumers thus increase their current spending "to beat" future price increases, thereby worsening inflation.

125. The elimination of the section would not mean, however, that the president would be powerless to impose control for foreign policy reasons.

From March 1986 to the adoption of the 1985 Export Administration Act exports have been controlled under the international emergency economic power act. Therefore in the absence of an Export Administration Act empowering the President to impose export control for foreign policy reasons, the president could use the International Emergency Economic Power Act to control exports for Foreign Policy reasons. 50 U.S.C. 1701-06.

126. Unpredictability in the imposition of export controls is the reason why firms subject to US jurisdiction have been regarded as unreliable suppliers. Unpredictability is inherent in Export Control regulations established for foreign policy reasons. The goals of foreign policy are fluid. "It is sometimes very difficult to identify foreign policy goals. For one thing, they may shift from one time to another."

It would help enormously [the business community] if they knew precisely what these goals were. Changes in foreign policy come not only from the administration but also from the Congress.

At any point in time, precisely what is a foreign policy goals and how to honor that goal may be quite difficult to determine. US
Export Control Policy and Extension of the Export Administration Act:
Hearings on S. 737 before the Subcomm. on International finance of
the Senate Comm. on Banking, Housing and Urban Affairs, Part I, 96th
Cong., 1st Sess. 189 (1979) (Statement of Richard Cooper, Under
Secretary of State for Economic Affairs). For controls imposed for
foreign policy purposes, contrary to controls imposed for national
security purposes the country and the product affected are
unpredictable. Foreign policy controls are, by definition directed at
no particular nations or group of nations. With the variety of
foreign policy goals that can be pursued under the Export
Administration Act, few nations in the world can be considered safe
from the application of controls. The human rights policy in
particular led to potential broad country coverage. Kenneth W.
Abbott, Linking Trade to Political Goals: Foreign Policy Export

127. David A. Andelman, Struggle over Western Europe, 49 FOREIGN

128. A clear illustration of an anti Soviet attitude which was
not translated into anti Sovietism was the French political situation
after May 1981. In May 1981 Francois Mitterand was elected
president, his first cabinet was formed with four communist
ministers. An examination of Mitterand and Marchais relations shows
that Mitterand was opposed to the French style communism of the
Marchais variety. But this attitude has not been translated directly
into fervent anti Soviet and pro American behavior. Following a
Gaullist tradition of independence, Mitterand refused to comply with
the June 1982 pipeline embargo, refused in April 1986 to let US
airplanes fly over France.

129. Ties between Europe and Russia date back to the Tzarist
period. The case of France is illustrative of such ties. France
during the third Republic France multiplied diplomatic contacts with
Russia leading to the conclusion of the Dual Alliance in 1893-94 and
setting the stage for World War I prior to World War II, in 1935,
Pierre Laval built a Franco-Russian alliance against Hitler.

130. In the field of culture, business, commerce, diplomacy, astronomy. Europe and the USSR have many exchanges. In 1979 the
Georges Pompidou (France) held a Paris-Moscow exhibition. In June
1982 a French astronaut was launched aboard a Soviet space capsule
with two Soviet astronauts.

131. David Lord Hacking, The Increasing Extraterritorial Impact
of US Laws: A Cause for Concern Amongst Friends of America, 1 NW. J.

132. The Coordinating Committee for Multilateral Export
Controls (C.O.C.O.M.) was created in 1950. The Committee memberships
are Japan and all the countries members of the North Atlantic Treaty
Organization (excepted Finland and Spain). The goal of the Committee
is to coordinate American and allies of the United States' export
control mechanisms. The Committee function through a particular mechanism, all its decisions are taken unanimously and the Committee is not empowered for sanctioning violation of its decisions. The Committee functions are mainly the establishment and the updating of three lists of goods and technologies embargoed:
- The Munition list
- The Atomic Energy list
- The Dual use list


138. "Without either a new demon or a new raison d'etre, the alliance is very likely to become increasingly irrelevant." Richard spielman, Crisis in Poland, 49 FOREIGN POLICY, 20-36 (1982).


140. On one hand the members of the alliance recognize that the extraterritorial application of the Export Administration Act is contrary to the economic expansion of the firms submitted to the jurisdiction of the United States. On the other hand these allies recognize the necessity to stop the Soviet Union from obtaining from the West high technologies used for military purpose. There is a definite technology leakage from the West to the East: Ninety percent of Western technology bought by the East is used to modernize the Soviet's army. One hundred-fifty from western component have been incorporated in Soviet weapons. For instance, the SS 20 minute
has been constructed using western gyroscopic technology in order to
European technology has been critical in the modernization of
Soviet's army. According to some experts, there is only a two year
gap between the Soviet and American armies. Françoise Haegel, *Le
COCOM et les restrictions aux exportations de haute technologie vers

This leakage is due as much to COCOM members "as to non COCOM"
members.

**Countries belonging to the OECD and to COCOM.** Belgium (FM),
Canada (1950), Denmark (1980), US (FM), France (FM), Greece (1953),
Italy (FM), Japan (1952), Luxembourg (FM), Norway (1980), Netherlands
(FM) Portugal (1952), Germany (1980), United Kingdom (1950), Turkey
(1953) and Spain (1985). FM = Former members 1949. The date between
parent hires is the date at which the country formed COCOM.

**Countries belonging to the OECD but not to COCOM** Australia,
Austria*, Finland, Ireland, Iceland, New Zealand, Sweden, and
Switzerland
* Sweden, Switzerland, and Austria belong to a list of countries
(India, Finland, Liechtenstein, Hong Kong, Syria, Malaysia, Iraq,
Singapore, South Africa and Lybia) which have submitted to US control
to avoid leakage of US technologies.

Outside US boundaries the US checks if US reexport controls
apply through three mechanisms: first, through denouncement; second,
the safeguard program which checks that computers ship to the East
are used in conformity with the end-use mentioned on the license; and
that, through members of the US administration working in Europe.

According to the US custom report of 1979, 200 frauds have been
reported that year. 1980, 350 customs officials in California have
discovered 440 frauds for the first months of 1982 (for the entire
years 1981, 181 have been registered). *Bus. Week*, 129-130 (1980).
From 1977 to 1981 illegal exports amounted to more than 150 million
dollars. The "Exodus Operation" has stopped 2800 illegal exports for
an amount more than 175 million dollars between October 1981 and the
end of 1983.

It is always for economic and not ideological motivations that
"firms submitted to the jurisdiction of the United States" export
illegally US technology. The KGB pays five times the real value of
Generally the USSR uses the Chanel "des exportations triangulaires."
Export through a third country not under embargo in order to obtain a
technology under embargo. The technology under embargo is shipped as
a component of a good which can be reexported under a general license
(dishwasher, conditioner) to a non COCOM member (Switzerland, Sweden)
or to Canada (due to special agreement between these two countries no
license is necessary to export goods or technology from the US to
Canada. Often the goods are then reexported to neutral countries
such as France, Germany before being shipped to a country under embargo) before being shipped to a country under embargo.

141. For instance France has its own export control system which can be described as a "light structure with few legal rules." Bernard Warusfel *Le controle des Exportations Strategiques.*

France has a long tradition of keeping administrative and military procedures secret. Contrary to the US which has a formal act regulating the export: the Export Administration Act, France has chosen not to pass a formal and special act for regulating its exports but to use legal structures already adopted for an other broad purpose, i.e., the custom code. The French export control mechanism, called "controle de la destination finale" check at the final destination has not been codified for 30 years.

However, during the past few years, a real effort has been made by the French government to broaden and reinforce French Export Control policy (August 8, 1981 an inter-ministerial commission has been created for studying certain high technology exports cases. The system regulating high technologies must be complimentary of the "systeme de la destination finale.") Nevertheless, French export control procedure is such a secret procedure that it's quite normal that the US feel obliged to apply their law extraterritorially to file what they consider to be a vacuum juris.

142. US may be "overcorrecting weaknesses, NAS study says, call for strengthened C.O.C.O.M., 4 INT'L. REP. CURRENT REP., 60 (1987).


149. For instance: _Re Uranium Antitrust Litigation_, 480 F. Supp. 1138 (N.D. Ill., 1979), 617 F.2d 1248 (7th Cir. 1980): Westinghouse Canadian, British, Australian and French uranium mining
corporation which, it was alleged, were responsible for establishing a cartel to control the world’s uranium market.

United States v. Deutches Kalinyndiktat Gesellshaft, 31 F.2d 199 (S.D. N.Y.). The Potasse d’ Alsace a French corporation, located in France, organized by the French government to administer the French potane industry. The only link between this company and U.S. antitrust law was that this company exported to the U.S.A. This fact has been considered by the U.S. administration as a sufficient base for jurisdiction for bringing in the United States against the French company an antitrust action.


151. Section 1 of the Sherman Act is drafted as to wit: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared illegal... Every person who shall make any contract or engage in any combination or conspiracy declared by this [Act] to be illegal shall be deemed guilty of a felony."

152. Section 2 of the Sherman Act is drafted as to wit: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign Nations shall be deemed guilty of a felony."

153. Neither the content of the Sherman Act or its legislative history gives any clear indication of the scope of jurisdiction conferred leaving such determination to the courts. Three periods can be distinguished:

a) From the adoption of the Sherman Act to the end of World War II the courts seem to confer to the Act a territorial application. This doubt on the intent of Congress to extend the Sherman Act to action perpetrated beyond United States territory has been clearly expressed by Justice Holmes opinion in American Bananal Co. v. United Fruit Co., 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909).

b) 1945 the adoption of the Effect Test and the beginning of the extraterritorial application of U.S. antitrust law. In United States v. Aluminum Co. of America (alcoa), 148 F.2d 416, 443-45 (2d Cir. 1945) Judge Learned Hand concluded that although Congress did not intend the Sherman Act to prohibit conducts having no effect in the
United States, it did intend the Act to reach conduct having consequences within this country—even where the parties concerned had no allegiance to the United States—if the conduct intended to and actually does have an effect upon United States import or exports. The "effect test was established and has been since constantly confirmed by the supreme court" [See e.g., Continental Ore v. Union Carbide & Carbon Corp., 370 U.S. 690, 705, 82 S.Ct. 1404, 8 L.Ed. 2d 777 (1962). See also Restatement (Second) of the Foreign Relation Law of the United States Section 18 (1965).]

c) Far reaching application of U.S. antitrust law: foreign reactions, and attempt by U.S. courts to find a clear & internationally acceptable rule of jurisdiction: "The balancing test." Due to the reaction of foreign government seeing the extraterritorial application of U.S. law as an infringement of their sovereignty, the U.S. courts have tried to find a criteria which would take into account U.S. interests as well as foreign interests. In Timberlane Lumber Co. v. Bank of America (749, U.S. 1378), the Court of Appeals for the Ninth Circuit adopted a balancing process in determining whether extraterritorial jurisdiction should be exercised. The Timberlane's balancing test requires the consideration of 10 criteria before to apply U.S. law outside the U.S. boundaries. The 10 criteria suggested by Judge Weiss are as follows: 1) The degree of conflict with foreign law or policy, 2) The nationality of the parties, 3) The relative importance of the alleged violation of conduct on the U.S. compared to that abroad, 4) The availability of a remedy abroad and the pendency of litigation there, 5) The existence of intent to harm or affect American commerce and its foreseeability, 6) The possible effect upon foreign relations if the court exercises jurisdiction and grants relief, 7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries, 8) whether the court can make its order effective, 9) whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstance, and 10) whether a treaty with the affected nations has addressed the issue.


156. Therefore, the effect test is an open door to the E.T. application of U.S. law even if in United States v. Imperial Chemical, 105 F. Supp. 215 (S.D. N.Y. 1952) the court have modified the effects doctrine by holding that U.S. antitrust law applies only to anticompetitive act which have a substantial material and direct effect upon U.S. commerce.

158. The Foreign Proceedings Act of 1976 is the first piece of foreign legislation especially designed to block U.S. antitrust law.

159. The Foreign Proceeding (Prohibition of certain evidence) Act, 1976, No. 121, Austl. Acts (1976), as amended, Foreign Proceedings (Prohibition of Certain Evidence) Amendment Act, 1976, No. 202, Aust. Acts (1976). The Act allows the Attorney General of Australia to issue directives "to ensure that documents in [Australia] are not able to be produced to courts or tribunals in other countries." The Attorney General decisions are free of judicial review. Only the Australian Parliament has the power to challenge the Attorney General decision such within fifteen days of the order issuance.


163. Mainly the act had three important provisions clauses 4-5-6:

a) **Clause 4:** Required that the Attorney General does not use its powers pursuant to the 1979 Foreign Antitrust Judgment Act if the conduct in question took place in the country in which the ruling court is situated.

b) **Clause 5:** In case of an adverse judgment has been declared partly or totally enforceable in Australia by the Attorney General, clause 5 allowed the Australian defendant who have been condemned by an overseas court to pay damages to recover these damages. Furthermore, clause 5 "pierced the corporate veil" allowing a corporation which had some links with the defendant corporation to have the same of recovery back as the defendant.

c) **Clause 6:** allowed any Commonwealth Nations, to sue to enforce an overseas antitrust judgment against the original plaintiff
as long as the Attorney General had recognized the underlying judgment enforceable.


167. Even if Australia was not directly involved in the Yamal Pipeline Controversy, the Crisis of 1982 made Australian government realize that at any time American Export Controls may be applied extraterritorially.


170. United States v. Aluminum Co. of America et al., 148 F.2d 416 (2d Cir. 1945).


174. McCulloch v. Sociedad National de Marineros de Honduras 372 U.S. 10 (1963) when the United States National Labor Relations Board (NLRB) sought to apply United States labor laws to foreign ships owned by United States nationals, Canada arranged for the filing of an amicus curiae brief in a supreme court case. The court ruled against the NLRB.

175. Commissionner of Internal Revenue v. Consolidated Premium Iron Ores, Ltd. 265 F.2d 320 (6th Cir. 1959). While most of the tax problems have been resolved by treaties preventing double taxation, some attempt by the US. to impose its taxes regulations have been the
cause of strong protest from foreign governments. For instance, the U.S. has tried to impose a tax upon the Premium Iron Ores Company which was granted a remission of all Canadian taxes for the first three years of its life.


177. Id. at 57.


179. The 1984 bill is an unexpected bill, it has been enacted only a few months after the signature of the antitrust cooperation agreement and such during a period of relatively good relations between the two countries.

180. Although Australia was not affected by the extension of U.S. export licensing requirement in June 1982 to include pipeline related equipment produced by subsidiaries of U.S. companies and by foreign companies under license from U.S. companies, the Australian government realized that existed a potential for harm to Australia and felt a need to enact a preventive legislation.

181. The Quebec and Ontario legislation are relative by ineffective due to the fact that they block the removal of documents but they do not cover copies.


183. While not specifically mentioned the Canadian Foreign Extraterritorial Measure Act is primarily directed toward the U.S. and represents the most aggressive defense to date adopted by Canada to block the extraterritorial application of U.S. export Control law as antitrust law.

184. Many commentators viewed the Canadian Foreign Extraterritorial Measure Act as a surprising and unexpected law. Due to the fact that this law has been enacted during the negotiation of a free trade agreement between Canada and the U.S. In our view this law was a realistic and forceable due to the slight chances that the free trade agreement enter into force.


189. In Re Uranium Antitrust Litigation: Westinghouse Electric Corporation v. Rio Algom Limited, 473 F. Supp. 382 (N.D. Ill. 1979). In October 15, 1976, the Westinghouse Electric Corporation filed a suit in the U.S. alleging that a uranium cartel consisting of 12 foreign and 17 domestic uranium companies were violating the Sherman Act. Nine of the foreign defendants including the two British companies insisted that the court did not have jurisdiction over them and refused to appear. The U.S. court responded by entering default judgment against all the absent defendants.

190. Id. at 188.


192. The PTIA does not intend that section I and section II will operate only at the direction of the Secretary of State. Private parties are permitted to request that the act be invoked. It is far more likely that private parties would be more aware of the fact that they may be affected by a foreign law than the British Government.

193. "overseas measures" are those "taken by or under the law of any overseas country for regulating or controlling international trade" and "insofar as they apply or would apply to things done or to be done outside the territorial jurisdiction of that country by persons carrying on business in the United Kingdom." Trade includes any activity carried on in the course of business of any description and "trading interests" shall be constructed accordingly. Catherine V. Mannick, Antitrust: British restrictions on enforcement of Foreign Judgments--Protection of Trading Interest Act 1980, 21 HARV. INT'L L. J., 727-735 (1980).


196. Export privileges will be denied for a period which cannot exceed five years if the individual or entity is located in the USA. But the statute of limitations applies only in the USA. Therefore, if the individual is not in the USA there is no more limit regarding to the denial of privileges.

197. U.S. discovery procedures have their origin in English chancery. However the two countries have developed their procedures in totally different ways. Today, English lawyers, as lawyers from civil law countries are concerned about the "fishing" expedition allowed by U.S. discovery.

Opportunities for obtaining evidence do exist in England, but the British discovery has another scope than the American one. United Kingdom’s discovery is not oral and cannot be extended to third parties. Furthermore, the letter of request must be drafted very carefully and if it is a request for documents, these documents must be specified with some particularity. Most importantly, the evidence must be genuinely required for a trial and not for pre-trial discovery. Laurence Collins, Opportunities for and obstacles to obtaining evidences in England for use in Litigation in the U.S., 17 INT’L L., 27-35 (1979).

198. "requirement" is defined as a request or demand from "a foreign court or authority" for document or information "addressed to a person in the United Kingdom" or a requirement to produce documents or information "to a person specified in the requirement."

199. The word authorities must be interpreted broadly therefore Section 2 can block orders or request issue by administrative agencies.

200. Id. at 188.

201. The concept of sovereignty has been created by Bodin during the 16th Century to react against a particular situation (i.e., to establish in France the supremacy of the King and his independence from the seigneurs, the Saint Siège and the Saint Empire Romain Germanique. This notion of "souveraineté indépendance" has been adopted and still kept by most of the nation state like England.

The United Kingdom as a sovereign nation state has some droit régaliens as the right and duty to enact laws and regulations, to maintain security, to issue coins, to determine its economic policy to choose its judicial procedure. Therefore, in the field of the droits régaliens--basic rights--the nation state can only have one policy. To let another state define its policy creates a risk of contradiction and its a renunciation by the state of its will and therefore of its independence. Any request of information addressed
directly to a british company or corporation without the approval of a British Court or authority is an infringement of the will of the United Kingdom and therefore of its sovereignty. Therefore in almost all requests, does not matter if the request harm the United Kingdom trading interest or infringe its jurisdiction, section II of the PTIA can be applied. Raymond Guillien & Jean Vincent, Lexique de Termes Juridiques, Dalloz (1974). André Haurriou, Droit Constitutionnel et Institution Politiques, Montchrétien (1968), Duverger, Institutions Politiques et Droit Constitutionnel, Themes (1970).

202. Id. at 184.

203. [1968] J. O. 7267 The 1968 law was implemented the next year by an order ("arrete") of the Minister of Transportation (1969) J.O. 544.


206. Paul Demaret, L’Extraterritorialité des lois et les relations transatlantiques: une question de droit ou de diplomatie, Colloque de Bruges des 13, 14, 15 Sept. 1984 "euro-American Relations and Global Economic Interdependance."


211. The Hague Convention does not apply to administrative proceeding. The Hague Evidence Convention has been in force in France since October 6, 1974.


214. C. Pr. Civ. arts 733-748 (Fr).
215. The Export Administration Act precludes judicial review under the Administrative Procedure Act. Therefore the Export Administration Act will probably never lead to request of information from the French business community during "une procedure judiciaire" but only during "une procedure administrative."

216. Fruehauf v. Massardy. D.S. Jur. 147 (1965). An English language summary of the case appears in 5 INT’L LEGAL MATERIALS, 476 (1966). A contract had been signed between Fruehauf France and Berliet France according to this contract, Fruehauf France, a French subsidiary of Fruehauf United States, would sell to Berliet equipment for use in tractor trailer units. These tractor trailer units were to be resold to communist China. Due to the deterioration of the relations between the U.S. and mainland China, the U.S. administration using its authority under the Trading with the Economy Act (TWEA) ordered Fruehauf U.S. to order Fruehauf France to cancel its contracts with Berliet. Berliet refused to negotiate an amiable termination of the contract and was ready to sue Fruehauf France for breach of contract. This trial would have lead Fruehauf France to bankruptcy and put into peril the jobs of its 600 employees. The three French directors brought suit against the five American directors. The French directors won their case. The court’s based its decision on the concept of abuse de droit to overturn the corporate decision taken by the majority of the shareholders in accordance with the normal corporate procedure but contrary to the corporate interest.

217 The concept of "abus de droit" is a notion of French civil law according to which if an individual or an entity empowered with a right use this right "en de hors de sa finalité" there is abuse of a legal right. Guillian, Lexique de termes juridiques (1974).

218. "The responsibility of [a] corporation to the government is expressed in terms of the goals set for private enterprises by the French economic program (Le Plan). The role of labor in the corporation is indicated by the fact that laborers are represented on the board of directors in the comite d’entreprise.

219. Encyclopedie Dalloz, Droit Civil I., "l’Abus de Droit". The French concept of abus de droit, concept of Civil Law, has been created by the court which is unusual for a civil law country as France. At the beginning used only in civil matters this concept has been progressively used in commercial litigations to overturn majority decisions taken against the society’s interest. David, Protection des minorités dans les sociétés par actions, Paris (1929), Lenourd, l’Annulation pour Abus de Droit des délibérations des Assembles Générales, Revue Trimestrielles de Droit Commercial, 1 (1962).

220. Decision affirmed by the Court d’Appel de Paris Encyclopédie Dalloz., Droit Civil, Volume 6.


223. Ordonnance of October 11th 1945. This ordonnance was used mainly for "réquisitions sociales"--requisition having a welfare goal as lodging for large family... Also the Code de l'administration communale--local administrative code gives to the mayor the right of requisition in case of fileaux calamiteux--calamitors scourge--ou d'exécution de décision judiciaires--to execute a court's order.

224. Have been considered as needs of general interest for the Nation: not only needs for national security but also for the installation of public services. Alais Forges et Camerque Conseil d'Etat 4 Avril 1944, Recueil du Conseil d'Etat, 225 (1964); the building of sports facilities for teenagers- -Gonneville et Daleux, Conseil d'Etat November 10th 1980, Recueil du Conseil d'Etat [Rec. Cons. d'Et.], 546 (1950); the lodging of refugees--la ruelle, Recueil du Conseil d'Etat [Rec. Cons. d'Et.] 344 (1945).

225. The right of requestioning is a discretionary right which cannot be reviewed by the courts. However, if the administration abuse of its discretionary right un recours pour excès de pouvoirs can be done in front of the administrative judge.

226. Section 4 of the Clayton Act provides for treble damages in antitrust violations, i.e., the actual damage is actually tripled in amount.

227. Suppl. No. 1 and 2 to Part 388 of the E.A.A. list by alphabetical order as by countries the names of companies and/or principals of such companies to which export privileges have been revoked or denied. Such companies and/or principals cannot order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance or otherwise service or participate in any transaction which is subject to the Export Administration Regulations.

228. Export Advice on Export Controls 1987, October 1987 London organized by Legal Studies and Services Ltd. Statement by Dr. Paul Freedenberg before the committee on foreign affairs subcommittee on international economic policy and trade, U.S. House of Representatives (Nov. 3, 1987). Statement by Allan Wendt, before the
Subcommittee on international economic policy and trade committee on foreign affairs, U.S. House of Representatives (Nov. 3, 1987).

229. Is a list maintained by the Export Administration of all commodities subject to U.S. Department of Commerce Export Controls. Section 339.1 of the Export Administration Regulations.


231. What is Good for Security may be bad for Business, N.Y. Times, Oct. 18, 1987, at 33, Col. 5.